Supreme Court, U. S.
FILED
SEP 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. ~~74~~-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK,
ATTORNEY GENERAL, ... PETITIONER,

versus

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION
AGENCY, ET AL ..... RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

COUNSEL FOR PETITIONER.

TABLE OF CONTENTS

Page

INDEX TO CITATIONS ..... iii-iv

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 3

I. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FINDING THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT WERE SUBJECT ONLY TO ACTIONS UNDER §304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2? 3

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF §118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f? 3

III. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE SUPREMACY CLAUSE? 3

TABLE OF CONTENTS (Continued)

Page

IV. WHETHER THE JUDGMENT RENDERED BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT WILL BE A SERIOUS HINDRANCE TO THE EFFECTIVE ADMINISTRATION OF THE CLEAN AIR ACT, AS AMENDED, 42 U.S.C. §1857, ET SEQ.? 3

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4-5

REASONS FOR GRANTING THE WRIT 6-22

CONCLUSION 22-24

CERTIFICATE OF SERVICE 25-27

APPENDICES:

A. Memorandum and Order, United States District Court, For the Western District of Kentucky, Louisville, Kentucky, Rendered August 10, 1973, Entered August 13, 1973. 362 F. Supp. 360 (1973) 1a-21a

B. Opinion, United States Court of Appeals For the Sixth Circuit, June 5, 1974. .....22a-35a

C. Clean Air Act as amended, 42 U.S.C. §1957, et Seq.; and Kentucky Administrative Regulation AP-1, Section 5 .....36a-46a

INDEX TO CITATIONS

CASES: Page

Baltimore National Bank v. *State Tax Commissioner,* 297 U.S. 204 (1936) 21

Ex Parte Collett,
337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207,
(U.S. Ill. and Ky., 1949) 11

Larson v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949) 22

Perez et ux v. *Campbell,*
402 U.S. 637 (1971) 22

62 Cases, More Or Less, Each Containing Six Jars of Jam v. *United States,*
340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 566
(U.S. N.M. 1951) 9

STATUTES:

Title 42, Section 1857., U.S.C. 3
Title 42, Section 1857(a), U.S.C. 12
Title 42, Section 1857(b), U.S.C. 12
Title 42, Section 1857c-2, U.S.C. 4, 13
Title 42, Section 1857c-5, U.S.C. 4, 13
Title 42, Section 1857c-8 U.S.C. 4
Title 42, Section 1857d-1, U.S.C. 4, 7
Title 42, Section 1857f., U.S.C. 3, 4, 5, 6
Title 42, Section 1857h-2, U.S.C. 3, 4, 5, 6, 16

INDEX TO CITATIONS (Continued)

STATUTES: Page

81 Stat. 485 4

84 Stat. 1678, 1680 4

85 Stat. 464 4

84 Stat. 1689, 1689, 1706 4

OTHER REFERENCES:

The Air Quality Act of 1967, Section 111, P.L. 90-148 10

Kentucky Air Pollution Control Commission Administrative Regulation AP-1, Section 5 ..... 4, 16

BEST COPY AVAILABLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL, ... PETITIONER,

versus

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; JACK E. RAVAN, REGIONAL ADMINISTRATOR, REGION IV, ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY; GENERAL CREIGHTON ABRAHAMS, CHIEF OF STAFF, UNITED STATES ARMY, UNITED STATES OF AMERICA; ROBERT F. FROEHLKE, SECRETARY, DEPARTMENT OF THE ARMY, UNITED STATES OF AMERICA; MAJOR GENERAL W. R. DESBORY, COMMANDER GENERAL, UNITED STATES ARMY ARMOR CENTER AND FORT KNOX; MAJOR GENERAL JOHN CUSHMAN, COMMANDING GENERAL, 101st AIRBORNE DIVISION (AIRMOBILE) AND FORT CAMPBELL; COLONEL ERNEST A. VULEY, JR., COMMANDING OFFICER, LEXINGTON-BLUEGRASS ARMY DEPOT, DEPARTMENT OF THE ARMY; DEPARTMENT OF THE ARMY, UNITED STATES OF AMERICA; AUBREY J. WAGNER, CHAIRMAN, BOARD OF DIRECTORS, TENNESSEE VALLEY AUTHORITY; LYNN SEEBER, GENERAL MANAGER, TENNESSEE VALLEY AUTHORITY; J. L. McPHERSON, SUPERINTENDENT, SHAWNEE POWER PLANT, TENNESSEE VALLEY AUTHORITY; T. E. CAVANISS, SUPERINTENDENT, PARADISE POWER PLANT, TENNESSEE VALLEY AUTHORITY; TENNESSEE VALLEY AUTHORITY; JAMES R. SCHLESINGER, CHAIRMAN, BOARD OF DIRECTORS, ATOMIC ENERGY COMMISSION; ROBERT E. HOLLINGSWORTH, MANAGER, ATOMIC ENERGY COMMISSION; B. W. STILLER, MANAGER, PADUCAH GASEOUS DIFFUSION PLANT, ATOMIC ENERGY COMMISSION; UNION CARBIDE CORPORATION, A NEW YORK CORPORATION; ATOMIC ENERGY COMMISSION ..... RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals For the Sixth Circuit rendered in these proceedings on June 5, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, as yet unreported, appears at Appendix A, infra, pp 1a-21a. The opinion of the United States District Court for the Western District of Kentucky is reported at 362 F. Supp. 360 (1973), and appears at Appendix B, infra, pp 22a-35a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit (Appendix A, infra, pp 1a-21a) was entered on June 5, 1974. This Petition For Writ of Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The jurisdiction of the District Court was invoked because the question arose under the Clean Air Act, as amended, 42 U.S.C. §1857, et seq., a Federal statute relating to the environment. The questions with respect to this statute presented in this Petition for Writ of Certiorari are as follows:

I. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FINDING THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT WERE SUBJECT ONLY TO ACTIONS UNDER §304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2?

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF §118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f?

III. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE SUPREMACY CLAUSE?

IV. WHETHER THE JUDGMENT RENDERED BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT WILL BE A SERIOUS HINDRANCE TO THE EFFECTIVE ADMINISTRATION OF THE CLEAN AIR ACT, AS AMENDED, 42 U.S.C. §1857, ET SEQ.?

STATUTORY PROVISIONS INVOLVED

This case involves Section 101, Section 107, Section 110, Section 113, Section 116, Section 118, and Section 304 of the Clean Air Act Amendments of 1970; 81 Stat. 485, 84 Stat. 1678, 1680, 85 Stat. 464, 84 Stat. 1689, 1689, 1706; 42 U.S.C. §1857., §1857c-2, §1857c-5, §1857c-8, §1857d-1, §1857f., and §1857h-2. Also involved is Kentucky Administrative Regulation AP-1 §5, also promulgated in Chapter 7 of Kentucky's Implementation Plan for the Attainment and Maintenance of National and State Ambient Air Quality Standards. These are reprinted in pertinent part in Appendix C, pp. 36a-46a infra.

STATEMENT OF THE CASE

Pursuant to the Clean Air Act Amendments of 1970, the Commonwealth of Kentucky adopted Kentucky's Implementation Plan for the Attainment and Maintenance of National and State Ambient Air Quality Standards, (Hereinafter referred to as "The Kentucky Plan"), and submitted this plan to the Environmental Protection Agency for approval as required by the Act. "The Kentucky Plan" approved by the Environmental Protection Agency contains a requirement that the owners and operators of air contaminant sources in the Commonwealth of Kentucky obtain permits to operate such facilities. Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., provides that Federal facilities which operate

air contaminant sources "shall comply" with State "requirements respecting control and abatement of air pollution."

Defendants Tennessee Valley Authority, Department of the Army, Atomic Energy Commission, and Union Carbide Corporation all operate or control air contaminant sources within the Commonwealth of Kentucky. These defendants refused to apply for and obtain permits as required in "The Kentucky Plan" and the Environmental Protection Agency refused, and continues to refuse, to commence appropriate action. On November 16, 1972, this action was brought in the United States District Court For The Western District of Kentucky in an effort to compel the individual defendants, all officers responsible for the conduct of their respective agencies and facilities, to comply with the requirements of "The Kentucky Plan" and asking declaratory and injunctive relief restraining the defendants from refusing to comply with the provisions of 42 U.S.C. §1857f.

The District Court granted the defendants' Motion for Summary Judgment holding that a permit has absolutely nothing to do with air quality and that Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. did not require the defendants to obtain permits under "The Kentucky Plan."

The Court of Appeals for the Sixth Circuit upheld the Judgment of the District Court, noting that a permit was unnecessary since appellant had a remedy under Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Sixth Circuit erred in its construction of the Clean Air Act, as amended, particularly with respect to Section 118 and Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. and §1857h-2. (Appendix C, *infra*) and the interrelation of those sections. The error in the reasoning of that Court is reflected in its conclusion that:

> "Congress intended that federal facilities comply with the emission standards and limitations of the state plan where they are located. Such compliance is mandated by Section 118 and made enforceable by legal action pursuant to Section 304. By defining the term 'emission standard or limitation' broadly in Section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation." (Appendix B, *infra*)

In this statement the Court has ignored the fact that Section 118 does not mandate compliance with the "substantive provisions of a state plan" but rather requires compliance with State "requirements respecting control and abatement of air pollution." Further, it is unnecessarily strained and circuitous to say compliance with "substantive provisions of a state plan" is "mandated by Section 118 and made enforceable by legal action pursuant to Section 304" since Section 304 itself quite clearly "mandates" compliance with such requirements and provides for such legal action completely independent of Section 118. It is a well established rule of this Court, followed numerous times, that every provision of a

statute is to be construed, if possible, so as to give it operative meaning and a corollary that no section of a statute should be given a construction which will render it redundant or meaningless where another interpretation will give it effect.[1] In making the determination that the state may enforce only those parts of its implementation plan deemed "substantive provisions" the Court below has rendered Section 118 a mere restatement of Section 304 in contravention of this principle of construction. In addition, such an interpretation renders utterly without meaning Section 116 of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857d-1 (Appendix C, *infra*) which provides:

> ". . . nothing in this chapter shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) ***any requirement respecting control or abatement of air polluation.***" (Emphasis Added).

This section indicates there is a difference between "requirements respecting control and abatement of air pollution" as used in Section 118 and "emission standard or limitation" as used in Section 304, for the section clearly demonstrates those phrases were not inter-changable and co-extensive in the minds of the Congress.

---

1. *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 25 L.Ed. 782 (U.S. Dist. Col. 1879); *Jarecki* v. *G. D. Searle & Co.*, 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed. 2d 859 (U.S. Ill. 1961); *Weinberger* v. *Hynson, Westcott & Denning, Inc.*, 93 S.Ct. 2469 (U.S. Va. 1973).

Nor does an examination of the words used in Section 118 indicate or justify the restriction of the meaning of the phrase "requirements respecting control and abatement of air pollution" to include only those "requirements" which embody "emission standards or limitations" as defined in Section 304. The relevant portions of Section 118 read as follows:

> "Each department agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

Section 118 continues by providing that the President may grant facilities exemptions from any requirement.

The mandate of this section is clear; Congress has ordered unequivocally that the facilities of the Federal Government are to comply with "State . . . requirements respecting control and abatement of air pollution." The only limits on this command are that such facilities need only comply to the same extent as other persons and that the President may exempt compliance by affirmative action. No mention is made in this section of an exemption from all requirements save "emission standards or limitations." However, it is exactly that exemption which the District Court and the Circuit Court of Appeals have written into the law with their Opinions. This is not the

BEST COPY AVAILABLE

proper function of the judiciary. As was stated in the case of *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 566 (U.S. N.M. 1951):

> "In construing a statute, the United States Supreme Court must construe what Congress has written, and cannot add, substract, delete or distort words used."

In this case what Congress has written is an uncompromising command to comply with State "requirements;" there is absolutely no language in this section indicating there are to be certain "requirements" imposed on "any person" for which compliance by Federal facilities is not required.

The District Court and the Circuit Court of Appeals have, however, gone beyond the natural and common import of the words which the Congress wrote, and have looked elsewhere for a clarification of "requirements respecting control and abatement of air Pollution." In past decisions this Court has indicated that in such circumstances the Court should examine the purpose for the statutory enactment; that is, the Court should strive to identify the "evil" with which the enactment seeks to deal.[2] When the enactment is an amendment to an existing act it seems obvious to look to the provision which Congress found inadequate and which was changed in order to determine the purpose of the change.

---

2. *Platt* v. *Union Pacific R. Co.*, 99 U.S. 48 (1878); *U. S.* v. *Katz*, 271 U.S. 354 (1926); *Shapiro* v. *U. S.*, 335 U.S. 1 (1948).

Prior to the enactment of Section 118 of the Clean Air Act Amendments of 1970, the Congress had required a program of voluntary cooperation in the area of air pollution by Federal agencies, embodied in Section 111 of The Air Quality Act of 1967, P.L. 90-148:

"COOPERATION BY FEDERAL AGENCIES TO CONTROL AIR POLLUTION FROM FEDERAL FACILITIES

"SEC. 111. (a) It is hereby declared to be the intent of Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare and with any air pollution control agency in preventing and controlling the pollution of the air in any area insofar as the discharge of any matter from or by such building, installation, or other property may cause or contribute to pollution of the air in such area."

What is immediately apparent from this provision is that in enacting Section 118 the Congress intended a radical change from the provisions of previous law; an examination of these two provisions clearly indicates that Congress wished to depart from an ineffective program of voluntary cooperation and move instead to a program of mandatory compliance. If, in making such a change, the Congress had desired to make only compliance with "emission standards or limitations" mandatory it need only have so stated. Obviously, this was not the statement made in Section 118, and, moreover, this was not the statement made in either the Senate nor the House versions. The Senate version of this section would have directed each Federal agency to "comply with the requirements of this Act in the same manner as any other person would so comply. . . ."[3] The House version would have required compliance with "applicable Federal, State, interstate, and local emission standards and with the purpose of this Act. . . ."[4] In neither case is there a simple statement that these facilities need only comply with "emission standards and limitations." Both versions raise questions concerning additional requirements relative to "the purpose of this Act," and the manner of compliance by "any other person," however, the District Court and the Circuit Court of Appeals each conclude based on this authority that "requirements respecting control and abatement of air pollution" are nothing more than "emission standards or limitations." This conclusion is clearly not warranted; as this Court stated in *Ex Parte Collett,* 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, (U.S. Ill. & Ky., 1949):

"The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

The search for the intent of Congress cannot end, however, with an examination of the purpose of a single

3. H. R. 17255, 91st Cong., 2d Sess., Sec. 111 (1970).

4. S 4358, 91st Cong., 2d Sess., Sec. 118 (1970).

section, it is necessary to see if that provision is consistent with the goals of the Act and the statutory plan for the accomplishment of those goals. The goals of the Clean Air Act as a whole are embodied in Section 101(b) of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 (b) (Appendix C, *infra*):

> "(b) The purposes of this title are —
>
> "(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
>
> "(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
>
> "(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
>
> "4) to encourage and assist the development and operation of regional air pollution control programs."

Clearly, then, one of the primary goals of the Act was to develop a "program" designed to achieve the "prevention and control of air pollution." That the air pollution prevention and control programs envisioned by the Act were to be State programs is clearly illustrated by the findings of the Congress embodied in Section 101 (a) of the Act, 42 U.S.C. §1857(a) (Appendix C, *infra*):

> "(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and
>
> "(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."

These sections demonstrate the States are to have primary responsibility in the area of air pollution and that the Federal Government is to provide financial assistance and leadership in developing the State plans. In enacting the Clean Air Act, as amended, the Congress of the United States set out and prescribed a carefully conceived plan through which the control and prevention of air pollution was to be accomplished; a plan whose core concept was the development of state control and prevention programs utilizing *State* plans designed to implement minimum national standards of air quality. The specific mechanisms to be employed in this Congressional plan were set out in particular in other sections of the Act. In Section 107, 42 U.S.C. §1857c-2 (Appendix C, *infra*), the Congress reaffirms the State's responsibility and directs that each shall prepare a plan for meeting these responsibilities:

> "SEC. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

The requirements for these "implementation plans" were set out in Section 110, 42 U.S.C. §1857c-5 (Appendix C, *infra*). The basic requirement contained in Subsection 110(a)(1), was that the plan "provide for

implementation, maintenance, and enforcement" of both the primary and secondary standards contained in the Act. Subsection 110(a) (2) required, in addition to "emission limitations, schedules, and timetables of compliance," that the plan:

> "(C) . . . includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator."
>
> "(F) . . . provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;"

Clearly, these are requirements designed to give assurance that implementation plans adopted by the States are adequate *to enforce* the standards and *to implement* the necessary controls on air contaminant sources to accomplish the goals and purposes of the Act. The concern of Congress that such plans contain adequate assurance of enforcement capability shows they understand

that the mere existence of standards is utterly meaningless without a means of administering and enforcing these standards; their concern was that that the States actually be able to *implement* the standards and achieve the goals of the Act. This is the Congressional "plan"; the "plan" for achieving the goals of the Act and to provide for the enhancement of the quality of this Nation's air.

The decisions of the District Court and the Circuit Court of Appeals do violence to this carefully conceived and Congressionally enacted plan. For "The Kentucky Plan" is the embodiment of the Congressional scheme of control for all air contaminant sources in the Commonwealth of Kentucky. In ruling "requirements respecting control and abatement of air pollution" as contained in Section 118 referred only to "emission standards or limitations" as defined in Section 304 these Courts have thwarted the intent of Congress and have denied effect to every provision and requirement of "The Kentucky Plan" which they do not deem to be a "substantive requirement." These Courts have swept away all the provisions which the Congress so carefully required and enumerated to assure that the States had the ability to *implement* the standards.

Obviously, this ruling will have a significant, long-term and detrimental impact on the future administration of the Clean Air Act. Pursuant to the direction of the Congress the Commonwealth of Kentucky prepared and adopted an implementation plan setting forth the procedures to be followed in fulfilling its primary responsibility under the Act, the prevention and control of air

pollution at its source. This plan and the procedures it contains were submitted to, and approved by, the Environmental Protection Agency. "The Kentucky Plan" contains, among other requirements related to the administration and implementation of the Act, a permit requirement. This permit requirement, embodied in Section 5 of Kentucky Administrative Regulation AP-1 and promulgated in Chapter 7 of "The Kentucky Plan" is the basic control provision of the entire "Kentucky Plan." (Appendix C, *infra*). It is through the use of the permit system Kentucky is able to insure that proper air pollution control equipment is installed, it is the mechanism through which the Commonweatlh is able to compel the production of data concerning air contaminant sources, including the ability to prescribe the monitoring techniques to be employed, and is, therefore, a provision which is absolutely necessary to the Commonwealth of Kentucky in carrying out its plan for achieving the standards. However, notwithstanding the requirements in the Act that the States are to adopt *implementation plans*, the Court below concludes that the standards are to be *implemented* by the use of legal action under the Citizen suit provision of the Act, Section 304, 42 U.S.C. §1857h-2. The Court states:

> "The language of Section 304 does not require that suit be deferred until actual violation of an established emission standard occurs. Subsection (f)(1) clearly permits the filing of an action for violation of a schedule or timetable of compliance." (Appendix B, *infra*).

This proposed manner of implementation fails to consider, however, the manner in which "schedules or timetables of compliance" come into existence. There is *no single* such compliance schedule; it is necessary to determine what is required to bring each separate air contaminant source into compliance and then to design a schedule for the steps which need to be taken, a compliance schedule does not automatically come into being. The only known factors which relate to all compliance schedules are the attainment dates by which time all air contaminant sources are to be in compliance with the standards. In Kentucky, provision has been made, under its implementation plan, for prior review and approval of the compliance schedules of each air contaminant source in the state; this is done through the use of the permit system. Under "The Kentucky Plan" no permit may be issued to an air contaminant source unless that source is in compliance with the standards or is committed to an approved compliance schedule which will bring it into compliance by the attainment date. If after review of the nature of the source and the control measures to be incorporated it is determined that the compliance schedule will indeed put the source in compliance then the permit is issued with the compliance schedule as an enforecable condition; the schedules themselves, have no independent legal significance. Moreover, none of the sources involved in this action are at this time in any way legally committed to any compliance schedules; indeed not all of these sources have submitted plans under which they could be expected to meet the standards by the attainment dates.

The District Court and the Circuit Court of Appeals

have both blithely ignored the nature of compliance schedules and the manner in which they come into being. In doing so they have altered the entire nature of the Clean Air Act and placed a significant and onerous millstone around the administration of the Act. The most significant error which has been made by the Courts below is that they have failed to recognize that the Clean Air Act, as amended, is primarily a regulatory statute. The manner of implementation which the Courts below have ruled Congress intended is based on an entirely different philosophy and principle; the Act is to be implemented by use of the penal principle of arrest, trial, and punishment. This principle is antithetical to the principle of planned prevention and control.

Accomplishment of the goals of the Act requires planning and control over all sources of air pollution, for it is a fact of life in the United States today that few, if any, of the major sources of air pollution, including facilities operated by the Federal Government as well as private enterprise, are currently in compliance with minimum standards necessary to protect human health. In the face of this problem the rulings of the Courts below place the implementation of the Act under a system much better suited to dealing with instances of deviation from an accepted norm. What is needed in the area of air pollution control, and what was provided by the Congress in the Clean Air Act, is a system which is capable of raising the National norm to a new and higher standard.

The Act is geared to the regulation, control, and prevention of air pollution at its source; it provides for

administration, the gathering and assessing of data, the development, disemmination, and use of new technology, and it directs the formulation and employment of implementation *plans*. This requires a system of planning and review not possible without a means of controlling all air contaminant sources, including those operated by instrumentalities of the Federal Government.

The decision of the District Court denies the states such control:

> "It seems apparent, therefore, that Congress at all times contemplated a self imposed policy of Federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures." (Appendix A, *infra*).

This ruling is echoed in the Opinion of the Circuit Court of Appeals:

> "We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end." (Appendix B, *infra*).

This action was filed and has been prosecuted with the sole purpose of securing for the Commonwealth the right to enforce the "air quality and emission standards" of the Act; it is absurd beyond belief to conclude there is nothing in the record to indicate that the Federal fa-

cilities in Kentucky have not cooperated with the enforcement of these standards. The rulings of the Courts below indicate that some of the major sources of air pollution in Kentucky are to regulate themselves. This means that in fulfilling its responsibilities under the Act the Commonwealth has no power to review the control measures to be used by these sources, and no place in the planning process but, rather must rely on the good intentions of the polluters themselves. This is not regulation as contemplated under the Act and this is not cooperation in meeting the standards. The states have been required to adopt elaborate plans to implement the standards, a regulatory plan which will enable the states to equalize the burdens of air pollution control among all the sources in a region. The Federal facilities in Kentucky have refused to abide by this plan; this is not cooperation in achieving the standards. These plans cannot be implemented or employed, instead the rulings of the Courts below and the position of the Federal facilities in Kentucky have reduced this Commonwealth to the role of policeman, catching violators and bringing them to justice in the courts. This was not the Congressional plan for the implementation of the standards.

In enacting Section 118 of the Clean Air Act Amendments of 1970 it was the intent of Congress to grant to the States a right commensurate with their responsibilities, the right to prevent and control air pollution at its source and to that end to exercise the requisite control over all sources within their boundaries. The command in Section 118 is clear and uncompromising in its generality and unmistakable in its thrust and intent; for purposes of air pollution

control, Federal facilities must comply with, and are subject to, the same requirements imposed on every other air contaminant source in the State. The "requirements" with which such facilities are to comply are the requirements which Congress was so careful to insure would be present in each State's implementation plan, the requirements which Congress referred to as "requirements respecting control and abatement of air pollution." This command, that these facilities "shall comply," has been thwarted by the decisions of the District Court and Circuit Court of Appeals, for in ruling there has been no waiver under the Supremacy Clause they have ruled that no command or mandate has been issued; that Section 118 does not create a mandatory and non-discretionary duty to comply in place of the system of voluntary cooperation which Congress intended to do away with.

The Court's reliance on the Supremacy Clause in this case is error. It is clearly the intent of Congress to subject Federal facilities to the State regulations involved. Also clear is the authority of Congress to waive the protection of this clause in terms of broad but uncompromising generality. Analagous in this regard is the case of *Baltimore National Bank* v. *State Tax Commissioner*, 297 U.S. 204 (1936) in which this Court ruled the Congress had consented to taxation of shares in a national bank which were held by an instrumentality of the Federal Government by enacting a statute which provided simply that "all" shares in such associations were taxable by the State in which the association had its principal place of business. Finally, the application of the Supremacy Clause in this case is contrary to the policy be-

hind the law, for far from being regulations which will frustrate Federal law, the evil against which the Supremacy Clause protects, the requirements contained in "The Kentucky Plan" are in furtherance of the goals of Federal law, and indeed were adopted pursuant to Federal law. See: *Perez et ux.* v. *Campbell,* 402 U.S. 637 (1971).

Likewise, the doctrine of sovereign immunity is inapplicable in the present case. It is well established that this doctrine is for the protection of officers of the soverign in the performance of their duties and that such protection does not extend to any actions of such individuals which are beyond his authority or in contravention of his duties. *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949). In the present case the individuals against whom relief is sought have uniformly exceeded their authority in refusing to comply with the mandate of a Federal statute and are properly subject to suit for specific relief.

CONCLUSION

This action concerns the manner of the implementation of a Federal staute. The construction of the Clean Air Act embodied in the decisions rendered by the District Court and the Court of Appeals for the Sixth Circuit does violence to the carefully conceived plan of the Congress for the implementation of this Act and constitutes a significant interference with the administration of the States' Implementation Plans and the achievement of the goals of the Act. The Act provides that the States are to have primary jurisdiction in the area of air pollution and the Congress provided in Section 118 that the Federal facilities involved were to comply with State "requirements respecting control and abatement of air pollution." The body of these requirements, in the Commonwealth of Kentucky, are contained in its Implementation Plan, however, the Courts below have written into the law provisions exempting Federal facilities from compliance with this plan in contravention of the intent of Congress. The importance of this action to the achievement of the goals of the Act is reflected in the fact that there are currently pending in the Fifth[5] and Ninth[6] Circuits similar challenges to the refusal of the Federal Government to comply with the Congressional mandate of Section 118. In ruling that the provisions of this Commonwealth's Implementation Plan are not "requirements respecting control and abatement of air pollution" the Courts below have thrown out the provisions of this State's Congressionally required plan, and have exempted many of this State's major polluters from control, a result which severely hinders the administration of the Clean Air Act and the pur-

---

5. *State of Alabama, et al,* v. *Lynn Seeber, et al,* Not Reported, File No. 73-2766, United States Court of Appeals, Fifth Circuit.

6. *California* v. *Statsny,* 4 ERC 1447, File No. 72-2905, United State Court of Appeas, Ninth Circuit.

pose and intent of Congress. For these and the foregoing reasons, this Petition for a Writ ot Certiorari should be granted.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF
KENTUCKY
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

DAVID C. SHORT
ASSISTANT ATTORNEY
GENERAL
COMMONWEALTH OF
KENTUCKY

DAVID D. BEALS
ASSISTANT ATTORNEY
GENERAL
COMMONWEALTH OF
KENTUCKY

Room 26, Capitol Bldg.
Frankfort, Kentucky 40601
Telephone (502) 564-3595

COUNSEL FOR PETITIONER.

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the foregoing PETITION FOR WRIT OF CERTIORARI was served by mailing true copies hereof, postage prepaid, to: Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Martin Green, Chief, Pollution Control Section, Department of Justice, Washington, D. C. 20530; Honorable Wallace Johnson, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Honorable Walter Kiechel, Jr., Deputy Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Honorable James A. Glasgow, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable William Saxbe, Attorney General, United States of America, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky, 40202; Honorable Jacques B. Gelin, Attorney, Appellate Section, Department of Justice, Washington, D. C. 20530; Honorable Kent Frizzell, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Tennessee Valley Authority, Knoxville, Tennessee, 37901; Honorable Robert H. Marquis, Associate General Counsel, Tennessee Valley

Authority, Knoxville, Tennessee, 37901; Honorable Beauchamp E. Brogan, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Justin M. Schwamm, Associate General Counsel, Tennessee Valley Autorithy, Knoxville, Tennessee 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwelath of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1109 East Broad Street, Richmond, Virgnia 23219; Honorable Evelle Younger, Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Jan Chatten Brown, Deputy Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Robert H. O'Brien, Assistant Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Nicholas C. Yost, Deputy Attorney General State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable John J. Hill, Attorney General, State of Texas, Post Office Box 12548, Austin Texas 78711; Honorable Larry F. York, First Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas 78711; Honorable Philip K. Maxwell, Assistant Attorney

General, State of Texas, Post Office Box 12548, Austin, Texas 78711; and Honorable James F. Gordon, United States District Judge, United States District Court, Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, Honorable Pierce Lively, Circuit Judge, United States Court of Appeals For the Sixth Circuit, and Honorable Lester L. Cecil, Senior Circuit Judge, United States Court of Appeals For the Sixth Circuit, Cincinnati, Ohio 45202; all this the 26th day of August, 1974.

David C. Short

DAVID C. SHORT
Assistant Attorney General
Commonwealth of Kentucky

David D. Beals

DAVID D. BEALS
Assistant Attorney General
Commonwealth of Kentucky

APPENDIX

APPENDIX A

Rendered: 8-10-73
Entered: 8-13-73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY,
Ex Rel ED W. HANCOCK,
Attorney General, Plaintiff

v. Civil Action No. 7480-G

ROBERT FRI,
Acting Administrator,
Environmental Protection Agency,
et al, Defendants

MEMORANDUM AND ORDER

This suit, brought on behalf of the Commonwealth of Kentucky by State Attorney General Ed W. Hancock, raises an important question concerning the authority of the States to regulate Federal activities and installations[1]

---

1. The Federal installations in question are: (1) Fort Campbell, Kentucky (home of the 101st Airborne Division); (2) Lexington-Bluegrass Army Depot, Lexington, Kentucky; (3) United States Army Armor Center and Fort Knox, Fort Knox, Kentucky; (4) Paducah Gaseous Diffusion Plant, Paducah, Kentucky, and (5) Installations operated by Tennessee Valley Authority.

under the Clean Air Act of 1970, 42 U.S.C. Section 1857 *et seq.* In general, the plaintiff asserts that Federal entities operating equipment or installation which emit air contaminants ***must secure a permit*** from the Kentucky Pollution Control Commission before operating such equipment. The permit requirement in question appears in Section 5 of the Kentucky Air Polution Control Commission Regulations AP-1. Section 5, which was part of the air implementation plan which Kentucky submitted to the Federal Government pursuant to Section 110 of the Clean Air Act of 1970, 42 U.S.C. Sec. 1857f provides in pertinent part as follows:

> (1) No person shall construct, modify, use, operate, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, *unless a permit therefor* has been issued by the Commission and is currently in effect. (Emphasis ours.)

The plaintiff further alleges that "Kentucky's Plan became Federal law pursuant to Section 110, 113, and 118 of the Clean Air Act of 1970 . . . [and] Section 118 of the Clean Air Act of 1970 requires that "federal facilities' comply with approved Kentucky Plan . . ." Complaint, page 13.

In his prayer for relief, the Attorney General seeks

a mandatory injunction requiring the defendants[2], except for the Environmental Protection Agency and its defendant-officers, to "apply for and to obtain permits from the Kentucky Air Pollution Control Commission . . ." (Complaint p. 25). Also, a prohibitory injunction is sought restraining the defendants "from refusing to comply with the provisions of Section 118 of the Clean Air Act of 1970." (Complaint p. 25). With respect to the EPA and its officers, the prayer requests that they be "[o]rdered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by the defendants . . . with the Kentucky plan . . ." A declaratory judgment and relief in the nature of mandamus are are also sought.

The TVA defendants moved to dismiss, or, in the alternative, for summary judgment. A motion to dismiss was filed by the non-TVA defendants. The plaintiff countered with a motion for summary judgment against the TVA defendants.

When these motions came on for hearing, it was apparent that it would be necessary, in the disposition thereof, that the Court consider matters in the nature of all affidavits and exhibits outside the pleadings. Rule 12b. F.R.C.P. Accordingly, it was agreed by all parties,

---

2. All of the defendants except the Tennessee Valley Authority (TVA) and its officers were represented by the United States Department of Justice. The TVA was represented by its own attorneys. For clarity, the defendants are sometimes alluded to as (1) non TVA defendants; and (2) TVA defendants.

by counsel, that there being no issue of material fact as pertained to the legal defenses asserted, the Court without objection, considered the entire matter as on cross-motions for summary judgment.

Only issues of law are before this Court.[3] These issues are: (1) whether the Clean Air Act of 1970 requires that the defendants obtain state permits before operating equipment which emits substances into the ambient air and (2) whether the doctrine of sovereign immunity is a barrier to maintenance of this suit.

THE PERMIT ISSUE

Congress recognized that Federal facilities emitted appreciable amounts of various substances into the ambient air. Therefore, it provided in Section 118 of the

---

3. The non-TVA defendants have submitted affidavits attesting that their installations, with a few minor exceptions which are being corrected, are in compliance with Kentucky's emission standards. The plaintiff has made contrary allegations. These factual disputes need not be tried, however, since matters of law control the disposition of the case. TVA has submitted to Kentucky detailed information concerning emissions from its facilities as required by Kentucky and in the form requested. TVA has also submitted plans and schedules for complying with Kentucky's emission standards. In furnishing such information, however, TVA informed Kentucky that while TVA fully intends to comply with its obligations under Section 118 of the Clean Air Act, those obligations do not include securing of state permits (Affidavit of Lynn Seeber). TVA accordingly has not applied for or obtained permits.

Clean Air Act for control of pollution from Federal facilities. In pertinent part. Section 118 provides as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

The question which is squarely before this Court is whether Congress intended, by enacting Section 118, to require the Federal Government to obtain permits from state agencies before operating equipment which generated air contaminants. Since this question must be answered in the negative, the defendants' motions must be granted.

All defendants contend that the requirement, in Section 118, that Federal entities "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution" simply means that Federal facilities must comply with the emission standards and implementation plans of Sections 109 and 110 of the Act and, except for new facilities, the monitoring and other requirements of Section 114. The legislative history of the Act supports the defendants' interpretation of Section 118.

The Clean Air Act of 1967, 77 Stat. 392, Section 111, required that Federal agencies shall "to the extent

practicable and consistent with the interest of the United States and within any available appropriations, cooperate with the Department of Health, Education and Welfare and with any air pollution control agencies in preventing and controlling the pollution of the air . . ." This provision was changed by the Clean Air Act Amendments of 1970. The following analysis of the legislative history of Section 118 of the Clean Air Act provides an indication of Congress' intent concerning the change from the provision in the 1967 Act to the one in the 1970 Amendments.

On June 10, 1970, the House of Representatives passed H.R. 17255, a bill to amend the Clean Air Act of 1967. This bill would have required each Federal agency to "comply with the applicable Federal, State, interstate, and local *emission standards* and with the purpose of this Act . . ." [emphasis supplied]. H.R. 17255, 91st Cong., 2d sess., sec. 111 (1970). The House Report on the bill states, "The legislation directs Federal agencies in the executive, legislative and judicial branches to comply with applicable Federal, State, interstate, and local emission standards." H.Rept. No. 91-1146, 91st Cong., 2d sess., p. 4 (1970). On September 22, 1970, the Senate passed S. 4358, a different bill to amend the Clean Air Act of 1967. The bill would have directed each Federal agency to "comply with the *requirements* of this Act in the same manner as any other person would so comply . . ." [emphasis supplied]. S. 4358, 91st Cong., 2d sess. sec. 118 (1970) The Senate Report on the bill states, "This section requires that Federal facilities meet the *emission standards* necessary to achieve ambient air

quality standards as well as those established in other sections of Title I" [emphasis ours]. S. Rept. No. 91-1196, 91st Cong., 2d sess., p. 23 (1970). Other sections of Title I of the Senate bill set forth emission standards for "new sources" (§112), "selected air pollution agents" (§114), "hazardous air pollution agents" (§115), and inspection, monitoring and entry provisions (§116). The above statement from the Senate Report clearly indicates that the "requirements" which the Senate bill would have Federal facilities comply with were the substantive emission "standards" set forth in the Act and other Title I provisions. The Senate bill did not require, any more than the House bill, Federal compliance with State procedures. Both the House and Senate language were changed by the Conference Committee. The new language, which was enacted by Congress, requires Federal facilities to "comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." Concerning this new language, the Conference Report states, "The House bill and the Senate amendment declare that Federal departments and agencies should comply with applicable standards of air quality and emission." H. Rept. No. 91-1783, 91st Cong., 2d sess., p. 48 (1970).

It seems apparent, therefore, that Congress at all times contemplated a self imposed policy of Federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures. If Congress had intended to abandon the well

established doctrine, which has its basis in the Supremacy Clause, that the Federal Government is immune from attempts by states to subject it to state regulatory measures,[4] it would have so stated.

It must be noted, moreover that, Congress was sensitive to the issue of federal-state relations in enacting the Clean Air Act and, in a number of instances, expressly stated the manner in which Federal and State authority would interact in the case of Federal facilities. Since Congress expressly granted authority to the states concerning some aspects of the Clean Air Act's impact on Federal facilities, the plaintiff's argument is, in essence, based on the contention that certain other grants of authority to the states must be implied from the phraseology of Section 118 of the Act. Such an argument flies in the face of the principle that, where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. 2 J. Sutherland, *Statutory Construction* sec. 4915 (3 ed. 1943).

Cases decided to date which support the conclusion arrived at herein include *California* v. *Stastny*, 4 ERC 1447 (C.D. Calif. 1972), appeal pending 9th Circuit, and an unreported order in *State of Alabama, et al* v. *Seeber, et al* (N.D. Ala., No. 72-939), June 5, 1973. Notice of appeal filed June 28, 1973. In *Stastny*, the court held

4. Eg.*McCullogh v. Maryland*, 4, Wheat, 316, 436 (1819); *Ohio v. Thomas*, 173 U.S. 276 (1899); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

that "[d]efendants are not required to either apply for or obtain permits from the Air Pollution Control District prior to operating or using any equipment or machines at the naval base at Long Beach, California." 4 ERC at 1448. In *Seeber*, the court dismissed a complaint which was quite similar to the one at bar.

We further note that a permit has absolutely nothing to do with air quality. The substantive requirements of the implementation plan (*e.g.*, emission standards and compliance schedules) do, and it is those "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements respecting control and abatement of air pollution" to which section 118 of the Clean Air Act refers.

THE CLAIM AGAINST THE EPA

In its second claim for relief, the plaintiff contends that the defendant Ruckelshaus,[5] Ravan and the Environmental Protection Agency have violated Section 113 of the Clean Air Act, U.S.C. sec. 1857c-8, by failing "to commence appropriate actions . . . to compel compliance with the Kentucky Plan as to permits to operate, time

5. Pursuant to Rule 25(d) (1) F.R.Civ.P., Robert Fri, Acting Administrator of the EPA, has been substitued as a defendant in place of William Ruckelshaus since Mr. Ruckelshaus has resigned from his former position as Administrator of EPA.

schedules, and emission limitations . . ." (Complaint para. 42). In paragraph 41 of the complaint, the plaintiff contends that there are "widespread violations of the Kentucky Plan, because of the inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations."

Since, as is held above, the defendants correctly construed their responsibility with respect to applying for a state permit, the plaintiff's claim against the EPA and its officers does not state a claim upon which relief can be granted, for it was based on the assumption that the defendants misconceived their duty with respect to applying for permits. In any event, Section 113(a) of the Clean Air Act clearly grants the Administrator discretionary authority and, consequently, the Administrator's failure to take action under Section 113(a) is unreviewable since it was agency action "committed to agency discretion by law." 5 U.S.C. sec. 701. *See eg., United States* v. *Walker*, 409 F.2d 477 (C.A. 9, 1970).

SOVEREIGN IMMUNITY

All defendants have vigorously asserted that the doctrine of sovereign immunity is a barrier to the plaintiff's suit. Since the doctrine is applicable it serves as an alternate basis for this Court's order.

Although the plaintiff listed in its complaint a number of statutes as the basis for this Court's jurisdiction in

the matter,[6] the plaintiff has apparently chosen to rely upon the Clean Air Act of 1970, 42 U.S.C. Section 1857 *et seq.*, with respect to the question of waiver of sovereign immunity.[7]

The sovereign immunity argument may best be analyzed in two steps. The first consideration is whether this suit, although in form against officers and agencies of the Federal Government, is actually a suit against the sovereign. Once we determine that this suit is against the sovereign, then we must also determine whether there has been a waiver of sovereign immunity in this instance.

To determine whether this suit against officers and agencies of the Federal Government must be treated as a suit against the sovereign, this Court is required to consider whether the suit would expend itself "on the public treasury or interfere with the public administration."

---

6. The plaintiff alleges, on page one of its complaint, that "(T)his action arises under the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States of America; U.S.C. 42 Section 1331; U.S.C., Title 42, Section 1857, et seq.; U.S.C., Title 5, Section 702; U.S.C., Title 28, Section 2201, et seq., and U.S.C., Title 28, Section 1361."

7. The defendants argued that the statutes listed in footnote six supra, did not vest this Court with jurisdiction. In its memoranda opposing the defendants' motions to dismiss and for summary judgment, the plaintiffs relied entirely on the Clean Air Act and did not urge that this Court had jurisdiction under any of the other statutes which it had invoked in its Complaint.

Dugan v. *Rank*, 372 U.S. 709, 620-621 (1963). For if the relief sought would interfere in a substantial way with important government functions, the suit, although nominally directed against individuals, is "a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Larson* v. *Domestic and Foreign Corporation*, 337 U.S. 782, 688 (1949).[8] In referring to sovereign immunity, the Sixth Circuit recently said:

> Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704, 69 S. Ct. 1457, 93 L.Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that the defendants are all named as individuals does not change the result. [*Ogletree* v. *McNamara*, 449 F.2d 93 (C.A. 6, 1971)].

The question which this Court must address is whether this suit is barred because the relief which the plaintiff requests would interfere with basic functions of national defense and the carrying onward of congressionally authorized activities. Even Professor Davis, one of the

8. The sovereign immunity doctrine is also applicable to the Union Carbide Corporation since the Complaint herein only concerns Union Carbide's role as a contractor whose actions are subject to the direction and control of the Atomic Energy Commission. See *Varson v. Roane*, Anderson Co., 342 U.S. 232, 236 (1952); *United States v. Boyd*, 378 U.S. 39 (1964).

foremost critics of the sovereign immunity doctrine, has acknowledged that:

> The most persuasive reason for sovereign immunity that has been found in reports of cases is a remark in a dissenting opinion of 1882, that "The sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion . . ." [*United States* v. *Lee*, 106 U.S. 196, 226 (1882)] Judicial interference would surely be harmful if the government were dispossed of its military bases and equipment during an emergency. [K. Davis, Administrative Law Text 498 (3d ed. 1972)].

This Court is persuaded that, if the plaintiff's arguments were accepted, the plaintiff could, although it disavows any intention of doing so, interfere with the execution of important Federal actions. In reaching the above conclusion, this Court has not ignored the provision, in Section 118 of the Act, that "[t]he President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ." The foregoing provision does not dispel the possibility that the plaintiff's permit powers, if applied to the defendants, might seriously interfere with important Federal functions. First, Section 118 limits the President's authority to grant an exemption to situations where the President has "requested such appropriation [for air pollution control] as a part of the budgetary process and

the Congress shall have failed to make available such requested appropriation." Moreover, the President is not empowered to grant exemptions with respect to new stationary sources. It is readily apparent, therefore, *that Section 118 does not grant the President sufficient authority to sweep aside all interference with vital Federal functions which may arise if the plaintiff were allowed to impose its permit power on the defendants.* The rationale supporting sovereign immunity in this case is, therefore, undiminished.

With respect to the question of whether Congress has waived the sovereign immunity of the United States, only a brief examination of the statutes relied upon by the plaintiff, with the exception of the Clean Air Act, is necessary.

28 U.S.C. Section 1331 has never been construed as a waiver of the sovereign immunity of the United States from suit. *E.g., Anderson* v. *United States*, 225 F.2d (C.A. 5, 1956); *Cotter Corporation* v. *Seaborg*, 370 F.2d 686 (C.A. 10, 1966). Moreover, the Declaratory Judgment Act, 28 U.S.C. Sections 2201, 2202, is procedural in nature and does not enlarge the jurisdiction of the district courts or waive the sovereign immunity of the United States. *E.g., White* v. *Administrator of General Services Admin.*, 343 F.2d 444 (C.A. 9, 1965); *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F.2d 409 (C.A. 5, 1951). As has been decided on many occasions, 28 U.S.C. Section 1361 did not waive sovereign immunity since it was only intended to ease the burden of proceeding against officials formerly suable only in the District of Columbia. *E.g.,*

Jarrett v. *Resor*, 426 F.2d 213 (C.A. 9, 1970); *Carter* v. *Seamans*, 411 F.2d 767 (C.A. 5, 1969). Although the plaintiff also invokes the Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, it is settled beyond doubt that constitutional provisions have no effect upon the sovereign immunity from suit. *E.g., Lynch* v. *United States*, 292 U.S. 599 (1934).

The plaintiff also cites the Administrative Procedure Act, 5 U.S.C. Section 703, *et seq.* In the Sixth Circuit, the A.P.A. is not deemed an independent grant of jurisdiction or a waiver of sovereign immunity. *Sierra Club* v. *Hickel*, 467 F.2d 1048, 1054 (C.A. 6, 1972),[9] *cert. den.* 41 U.S.L.W. 3525.

We now arrive at the critical question concerning waiver of sovereign immunity; whether Congress intended, by anacting the Clean Air Act, to waive the Federal Government's immunity from a suit attempting to compell officers in charge of Federal installations to obtain state permits for equipment which discharges pollutants into the ambient air. The plaintiff contends that, by enacting Section 118 of the Clean Air Act, 42 U.S.C. sc. 1857f, Congress waived the sovereign immunity of the United States. Section 118 does not expressly waive the sovereign immunity of the Federal Government. The

9. After thoroughly reviewing the relationship of the A.P.A. to the doctrine of sovereign immunity, the Fourth Circuit also concluded that "the doctrine of sovereign immunity applies independently of the judicial review provisions of the A.P.A." *Littet v. Morton*, 445 F2d 1207, 1213 (C.A. 4, 1971).

plaintiff has attempted to overcome the absence of express language concerning waiver by quoting from the debate on the House and Senate versions of the Clean Air Act of 1970. Putting aside the small weight which is usually given to debate on the floor in resolving questions of statutory interpretation, the debate upon which the plaintiff relies simply does not address the question of whether Congress intended that Federal installations must submit permit applications to states which have incorporated a permit provision in their implementation plans.

In two sections of the Clean Air Act, Congress provided judicial remedies and, in so doing, waived the sovereign immunity of the United States. Section 304 and 307: 42 U.S.C. sections 1857h-2 and 1857h-5. It is axiomatic, however, that a waiver of sovereign immunity is coextensive with the remedies which Congress provided. That Congress did not provide a remedy with respect to the Government's decision that a state permit need not be obtained must be carefully noted.

For the reasons discussed above, it is obvious that Congress did not unequivocally waive the sovereign immunity of the United States from suits attempting to compel its officers to obtain permits from state agencies before discharging, from Federal facilities under their control, substances into the ambient air.

It has been settled law since *McCulloch* v. *Maryland* 17 U.S. (4 Wheat.) 316 (1819), that by virtue of Article VI, clause 2 of the Constitution there is an entire absence of power on the part of the states to subject instrumentalities of the Federal government to state regulation or control. And, as said in *Mayo* v. *United States*, 319 U.S. 441 (1943):

> This freedom is inherent in sovereignty . . . where . . . Congress does not *affimatively declare its instrumentalities or property subject to regulation* or taxation *the inherent freedom continues* [pp. 447-48].

An intention by Congress to depart from this long settled principle *cannot be inferred or implied*. In the words of the Supreme Court, there must be a *"clear* congressional mandate." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954). "Cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). *Soriano* v. *United States*, 352 U.S. 270 (1957)

If the Congress intended such a mandate in the present situation, we must assume that it would have said so *plainly*, as it has done when it did so intend.[10]

---

10. See for example, section 10 of the Federal Control Act (40 Stat. 456 (1918), which provides in pertinent part:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law . . . . Actions at law or suits in equity may be brought by and against such carriers . . . and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

See also section 304 of the Clean Air Act, 42 U.S.C. §1857h-2 (1970).

Since the plaintiff has not shown an "unequivocal waiver" of sovereign immunity, its arguments concerning waiver are not persuasive.

PROCEDURAL ASSERTIONS

The TVA defendants additionally raised two procedural defenses:

(1) Whether the Attorney General of Kentucky had the power to maintain this action absent the request and consent of the Kentucky Air Pollution and Control Commission, and

(2) Whether the action, which purports to be a Class Action on behalf of "all citizens, counties, political subdivisions and agencies of the Commonwealth of Kentucky," is maintainable as a Class Action.

For the benefit of our judicial superiors on appeal we wish to clearly express our reaction to the above that they might have before them laid out cold our entire reaction, thus:

As to No. (1) above. The dispute centers around the meaning of KRS 224.991, which provides in part as follows:

> (2) It shall be the duty of the Attorney General, *upon the request of the commission* . . . to bring an action for an injunction against any person . . . violating or threatening to violate any order or determination of the commission . . . .
>
> * * *

> (4) The authority herein vested in the Attorney General, *upon request of the commission*, to bring actions for injunctions . . . shall be exclusive.

It is undisputed that no such request has been made by the Commission, and that, in fact, TVA was engaged in discussions with the Commission concerning TVA's interpretation of Section 118 at the time this action was filed. The Attorney General admits that the General Assembly can restrict his authority to bring actions, but contends that KRS 224.991 is not such a restriction. He contends that the statute merely makes it his duty to bring actions upon the Commission's request, but does not expressly prohibit him from bringing actions without such a request. Although the matter is not free from doubt, the Court is inclined to agree that in the circumstances of this case, the Attorney General can maintain the action without a request from the Commission.

As to the Class Action assertion, the TVA defendants maintain that this action cannot be brought as a Class Action. The Court agrees. KRS 224.991(4) provides:

> *The authority herein vested in the Attorney General . . . to bring actions for injunctions for violations of* KRS 224.310 to 224.460 or of *any regulation*, or order issued thereunder, *shall be exclusive.* Nothing herein contained shall abridge the right of any person to recover actual compensatory damages resulting from any such violation.

Such language clearly shows the intention of the Kentucky General Assembly to debar actions for ***injunctive*** relief from alleged violation of Commission regula-

tions to *all* entities in Kentucky *except* the Attorney General acting on behalf of the Commission, who has "exclusive" power to seek such relief. Moreover, any duty to obtain a permit under these regulations is owed *only to the Commission,* not to "all citizens, counties, political subdivisions and agencies of the Commonwealth." There are no questions of law or fact common to the alleged class, and plaintiff is not a member of the class sought to be represented. The action is not a proper class action under Rule 23. FED.R.Civ P.

Plaintiff seeks to justify a class action on the basis of Section 304 of the Clean Air Act, 42 U.S.C. §1857h-2, which provides in part:

> Except as provided in subsection (b) of this section, any person may commence a civil action *on his own behalf* . . . .

Not only does this statute not provide for class actions, but its legislative history expressly states that such actions are prohibited. Section 304 originated in S. 4358, 91st Cong., 2d Sess. (1970). The Senate Committee Report on that section states:

> *Section 304 does not authorize a "class action."* Instead, it would authorize a private action by any citizen or citizens acting *in their own behalf.* [S.Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970)]

This section pertaining to citizen suits was adopted by the Conference Committee and was enacted into law as Section 304 of the Clean Air Act. Accordingly, this action

cannot be maintained as a class action under either Rule 23 or the Clean Air Act.

Accordingly, the Court is of the opinion that all motions of all defendants for summary judgment are due to be denied. A separate judgment to such effect will be entered herewith.

SO ORDERED.

August 10, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record.

* * * * * * *

APPENDIX B

Received Jun 6, 1974

No. 73-2099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY,
Ex Rel., ED HANCOCK, Attorney
General, Plaintiff-Appellant,

v.

WILLIAM D. RUCKELSHAUS, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky

Decided and Filed June 5, 1974.

Before: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

LIVELY, Circuit Judge. This case is concerned with the Clean Air Act Amendments of 1970 (the Act), and more particularly with the meaning of section 118 there-

of, 84 Stat. 1689, 42 U.S.C. § 1857.[1] The Attorney General of Kentucky brought this action against various federal departments and agencies which operate facilities within the State that employ pollutant emitting equipment. Included among the defendants were the Secretary of the Army and various Army officers, the chairman of

---

1. Section 118 provides:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requehted appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

BEST COPY AVAILABLE

the Board of Directors of the Atomic Energy Commission (AEC) and various officials of that agency and the managing officers of the Tennessee Valley Authority (TVA). The complaint recited that a "Kentucky Plan" for implementation of air quality standards had been adopted, and approved by the Environmental Protection Agency (EPA), and that the plan included a regulation which requires the owners and operators of air pollutant emitting equipment to apply for and obtain from the Kentucky Air Pollution Control Commission (Commission) "a permit to operate their air contaminant equipment."[2] Stating that the defendants had refused to apply for and obtain such permits, the plaintiff asked for an order directing them to do so and that they be permanently restrained from refusing to comply with the provisions of section 118 of the Act.

Also named defendants were the Administrators of EPA and the regional administrator whose responsibility includes Kentucky. It was complained that these defendants had refused to initiate appropriate actions against the previously named defendants to require their compliance with the permit requirements of the Ken-

2. Administrative Regulation NO. AP-1, §5 provides:
(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

tucky Plan. It was alleged that section 113 of the Act[3] requires the EPA administrators to proceed in the manner requested. The relief sought against these defendants was entry of an order directing them to commence an action under section 113 to obtain full compliance by

3. Section 113 (42 U.S.C. §1857c-8) provides, in part, as follows:

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Adminstrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(Continued on next page)

the other defendants with the permit requirement. In addition, a declaratory judgment was sought to the effect that the defendant operators of federal facilities do not have the right to refuse to comply with the permit regulations of the Kentucky Plan and that the EPA defendants, with knowledge of widespread violations by the other federal defendants, do not have a right to fail to initiate appropriate action under section 113.

All defendants filed motions to dismiss or for summary judgment. The plaintiff also filed a motion for summary judgment and various parties filed affidavits in support of their motions. Although plaintiff did not concede that all the federal facilities in Kentucky are in compliance with air pollution emission standards or have adopted schedules which will bring them into compliance, the district court determined that resolution of this is-

---

(Continued from previous page)

(B) by bringing a civil action under subsection (b) of this section.

* * *

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a) (1) of this section of a finding that such person is violating such requirement;

sue was not required for decision of the case. Upon consideration of the cross-motions, District Judge James E. Gordon granted summary judgment to the defendants and dismissed the action.

The issues on appeal are narrow. In the first place, the appellant contends that section 118 of the Act "requires that those persons in charge of the administration and operation of air contaminant sources owned or operated by the federal government comply with all state requirements respecting the control and abatement of air pollution including Kentucky's permit requirements." The appellees maintain that section 118 requires compliance with substantive provisions of the Kentucky Plan, but does not compel federal officials to obtain state or local permits for the operation of federal facilities. It is the position of the appellant that the permit requirement is substantive in nature because the Kentucky Plan is so formulated that the State cannot meet its primary responsibility under the Clean Air Act without the use of permits. To this the appellees respond that they are willing to supply, and in fact have supplied, the information sought on the permit application form, but will not seek the permit itself.

It is agreed by the parties that section 304 of the Act[4] provides a means by which the United States may

---

4. Section 304 (42 U.S.C. § 1857h-2) provides in pertinent part:

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(Continued on next page)

be sued for violation of an emission standard or limitation, or order with respect thereto. The appellant argues that this provision only permits abatement actions and that the Commission needs to be able to prevent air pollution as well as abate violations. It is maintained that the permit device is the only means by which the State can exercise preventive control over polluters. The language of section 304 does not require that suit be deferred until an actual violation of an established emission standard occurs. Sub-section (f)(1) clearly permits the filing of an action for violation of a schedule or timetable of compliance. Thus, it is not necessary

---

(Continued from previous page)

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

Definition

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

under section 304, that the State or other aggrieved party wait until an emission standard is violated to bring suit. It may be done at the first instance where the owner or operator of polluting equipment fails to meet a level prescribed in a schedule or timetable of compliance. Such an action would surely be preventive in nature.

Both the doctrine of sovereign immunity and the application of the Supremacy Clause of the Constitution are involved in the decision of this case. We view the action against the non-TVA defendants as a suit against the United States. The sovereign can only act through its agents, and the relief sought in this case does not seek to impose personal liability of the named defendants, but rather would affect public administration *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688-689 (1949); *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). Every declaration of a waiver of sovereign immunity must be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Section 118 contains no waiver and that included in section 304 does not permit suit to require owners and operators of federal facilities to obtain permits from a state agency in order to continue to operate. The two sections are part of the same Act and must be read together. By failing to include a separate waiver of immunity in section 118 Congress indicated that compliance with its provisions may be compelled by suit only to the extent permitted by section 304. This section provides ample means for enforcement of air quality and emission standards.

The TVA defendants do not claim sovereign immunity from suit, but do maintain that the Supremacy

Clause of the United States Constitution exempts federal agencies and officials in the performance of their duties from state and local regulations. From the time of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this has been a settled principle of our federalism. See *Mayo* v. *United States*, 319 U.S. 441, 445-448 (1943). The doctrine has been held applicable to TVA. *Posey* v. *Tennessee Valley Authority*, 93 F.2d 726, 727 (5th Cir. 1937). The appellant argues that Congress determined in this instance to submit federally owned and operated facilities to state regulation by providing, in section 118, that agencies of the federal government "shall comply" with state requirements. This does not necessarily follow. An examination of the legislative history of the 1970 Act reveals no congressional intent to subject federal instrumentalities and agencies to state administrative regulations. Separate House and Senate bills were interpreted in the respective Reports as requiring federal agencies to comply with applicable "emission standards" and the Joint Conference Report stated that the House bill and Senate amendment which became section 118 "declared that Federal departments and agencies should comply with applicable standards of air quality and emissions." This language appears to us to refer only to substantive requirements and not to encompass the Kentucky regulation which requires permits. In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.

The plaintiff also relies on Executive Order No. 11507 which was issued on February 4, 1970 as authority for the proposition that the federal agencies and instrumentalities sued here are required to obtain Kentucky permits. This Executive Order, while in force, was never so construed by the Environmental Protection Agency, as shown by documents filed in connection with the motions for summary judgment. Such administrative construction is entitled to great weight particularly when it is supported by the legislative history of the Act to which the Order refers. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). Furthermore, the order in question was superseded by Executive Order No. 11752 on December 17, 1973 which contains this policy statement:

> SECTION 1. *Policy*. It is the purpose of this order to assure that the Federal Government, in the design, construction, management, operation, and maintenance of its facilities, shall provide leadership in the nationwide effort to protect and enhance the quality of our air, water, and land resources through compliance with applicable standards for the prevention, control, and abatement of environmental pollution in full cooperation with State and Local governments. Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be

> interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control.

We find no support in the language of Executive Order No. 11507 for an interpretation of section 118 in accord with plaintiff's contention, and such an interpretation is clearly negatived by the quoted portion of Executive Order No. 11752.

There has been a congressional waiver of immunity with respect to one group of defendants in this action, the EPA administrators. Section 304(a)(2) of the Act (42 U.S.C. § 1857h-2(a)(2)) provides for an action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The question here is whether the act or duty which the plaintiff sought to have the court order the EPA defendants to perform is mandatory or discretionary. This requires a consideration of the language of section 113 of the Act since the complaint demands that these defendants be "[o]rdered to commence appropriate action under Section 113" to obtain full compliance with the Kentucky Plan. A reading of section 113(a)(1) reveals that that Administrator *shall* give notice to persons in violation of the plan, but that he *may* thereafter issue an order or bring an action under subsection (b). The same language is used in section 113 (a)(2), which deals with widespread violations of an implementation plan. Again, the Administrator is required to give public notice of his finding, but *may* enforce any requirement of the plan by issuing an order or commencing an action under sub-section (b). Section 113(b) uses only the discretionary "may"; the mandatory "shall" does not appear. The district court correctly held that it had no power to review the decision of EPA not to commence actions under section 113 since this was a decision on "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

A review of the Act as a whole supports the views set forth in this opinion. Congress clearly intended that federal facilities comply with the emission standards and limitations of the state plan where they are located. Such compliance is mandated by section 118 and made enforceable by legal action pursuant to section 304. By defining the term "emission standard or limitation" broadly in section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation. The chief purposes of the Act are "to protect and enhance the quality of the Nation's air resources" (§ 101(b)(1)) and rapidly bring into being "a program to achieve the prevention and control of air pollution." (§ 101(b)(2)). We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end. The national dedication to improvement of the environment by prevention and control of air pollution is in no way

impeded by exempting federal agencies from the permit requirement of Administrative Regulation No. AP-1, § 5.

The judgment of the District Court is affirmed.

OFFICE OF THE CLERK
JOHN P. HEHMAN
Clerk

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

June 5, 1974.

Mr. Ed W. Hancock
Mr. David C. Short
Mr. David D. Beals
Mr. Wallace H. Johnson
Mr. George J. Long
Mr. G. Wilson Horde
Mr. Robert H. Marquis
Mr. Andrew P. Miller
Mr. John L. Hill
Mr. Robert F. Trevey
Mr. Evelle J. Younger

Re: Commonwealth of Kentucky, ex rel., Ed W. Hancock, Attorney General, Plaintiff-Appellant,

vs.

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.

Case No. 73-2099

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

John P. Hehman, Clerk
/s/Grace Keller
Chief Deputy

Enclosure

* * * * * * *

APPENDIX C

"SEC. 101. (a) The Congress finds—

"(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

"(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

"(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

"(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

"(b) The purposes of this title are—

"(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

"(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

"(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

"(4) to encourage and assist the development and operation of regional air pollution control programs.

"SEC. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geopraphic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

"(b) For purposes of developing and carrying out implementation plans under section 110—

"(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

"(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided

by the State into two or more air quality control regions with the approval of the Administrator.

"(c) The Administrator shall, with 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the governors of the affected States of any designation made under this subsection.

"SEC. 110. (a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing provided, each State shall consider its plan implementing such sec-

ondary standard at the hearing required by the first sentence of this paragraph.

"(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile,

and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

"SEC. 113. (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such findings. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

"(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such

violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

"(A) by issuing an order to comply with such requirement or

"(B) by bringing a civil action under subsection (b).

"SEC. 116. Except as otherwise provided in sections 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing is this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

"SEC. 118. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall compy with Federal State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specificially requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

"SEC. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

"(b) No action may be commenced—

"(1) under subsection (a) (1)—

"(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (ii) to any alleged violator of the standard, limitation, or order, or

"(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to

require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

"(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c) (1) (B) or an order issued by the Administrator pursuant to section 113(a). Notice under the subsection shall be given in such manner as the Administrator shall prescribe by regulation.

"(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

"(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

"(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

BEST COPY AVAILABLE

"(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

"(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

> "(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or
>
> "(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

KENTUCKY ADMINISTRATIVE REGULATION

AP-1 SECTION 5

(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

Supreme Court, U. S.
FILED
NOV 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK,
ATTORNEY GENERAL, ...PETITIONER,

versus

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION
AGENCY, ET AL .....RESPONDENTS.

SUPPLEMENTAL MEMORANDUM

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

COUNSEL FOR PETITIONER.

TABLE OF CONTENTS

Page

INDEX TO CITATIONS ii

SUPPLEMENTAL MEMORANDUM 1-5

CERTIFICATE OF SERVICE 6-7

APPENDICES:

D. Opinion of United States Court of Appeals For the Fifth Circuit styled "State of Alabama and Alabama Air Pollution Control Commission ex rel. William J. Baxley, Attorney General v. Lynn Seeber, General Manager of Tennessee Valley Authority, et al," rendered October 14, 1974, File No. 73-2766 ..... 1d-27d

INDEX TO CITATIONS

Page

CASES:

State of Alabama and Alabama Air Pollution Control Commission ex rel. William J. Baxley, Attorney General v. Lynn Seeber, General Manager of Tennessee Valley Authority, et al, United States Court of Appeals For The Fifth Circuit, File No. 73-2766 ..... 1, 2, 3, 4

STATUTES:

Section 118, Clear Air Act Amendments of 1970, Title 42, Section 1857f., U.S.C. 2, 3, 4

Section 110, Clean Air Act Amendments of 1970, Title 42, Section 1857c-5, U.S.C. 2, 3

Section 304, Clean Air Act Amendments of 1970, Title 42, Section 1857h-2, U.S.C. 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL, ...PETITIONER,

VS: SUPPLEMENTAL MEMORANDUM

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL .....RESPONDENTS.

MAY IT PLEASE THE COURT:

In the Petition For A Writ of Certiorari to the United Court of Appeal For the Sixth Circuit, filed by the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, and docketed on September 3, 1974, it was noted there were cases pending in the Courts of Appeals For the Fifth and Ninth Circuits involving issues identical to those decided in the Sixth Circuit. On October 14, 1974, and since the filing of the Petition herein, the United States Court of Appeals For the Fifth Circuit rendered an Opinion and decision in the case of *State of Alabama* v. *Seeber,* Fifth Circuit, File No. 73-2766 (appears herein at Appendix D, pp 1-27).

The decision of the Fifth Circuit embodies an interpretation of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 et seq., which is in direct and irreconcilable conflict with the interpretation of this Federal statute rendered by the Sixth Circuit, which decision is the basis of this Commonwealth's Petition. In *Seeber, infra,* Appendix D, the Fifth Circuit ruled that Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., imposed a duty on Federally controlled air contaminant sources to apply for and obtain air pollution permits from the State of Alabama and to comply with the elements of Alabama's Implementation Plan approved under Section 110 of the Act. 42 U.S.C. §1857c-5.

The decision of the Fifth Circuit is at odds with virtually every significant interpretation of the Clean Air Act Amendments of 1970 rendered by the Sixth Circuit. Primarily on the basis of the legislative history, the Sixth Circuit concluded Section 118 subjected Federal instrumentalities and agencies only to the "substantive" requirements of Kentucky's Implementation Plan, a categorization which did not include Kentucky's permit requirement. However, in dealing with the argument in *Alabama* v. *Seeber, infra,* Appendix D, the Fifth Circuit characterized the procedural-substantive dichotomy as a "semantical red herring" drawing "no sustenance from the Act itself," (Appendix D, p. 15), and accurately characterized the Sixth Circuit's examination of legislative history "a strained reading." (Appendix D, p. 17). Rather than reaching for significance in a legislative history which they concluded was ambiguous, the Fifth Circuit relied "on the words of Section 118, the scheme of the Act

as a whole, and what we discern to be the Congressional purpose, as the best guides to interpreting the section." (Appendix D, p. 19). Petitioner herein has argued these should be, and are, the controlling principles of interpretation, particularly where, as here, the legislative history is ambiguous. Based on these factors the Court in *Seeber* concluded that Federal facilities were subject to Alabama's permit requirement (Appendix D, pp. 7-20), a requirement substantially identical to that contained in Kentucky's Implementation Plan.

It has been, and is, petitioner's contention that an examination of the legislative purpose of the Clean Air Act Amendments of 1970, a tracing of the "scheme" for achieving those purposes through the Act as a whole, and the plain, unambiguous language of Section 118, lead inalterably to the conclusion that the requirements of a state's Implementation Plan, adopted pursuant to Section 110 of the Act, are "requirements respecting control and abatement of air pollution" within the meaning of Section 118. As such, they are requirements with which Federal facilities "shall comply" under the mandate of Section 118. As stated by the Court in *Seeber* (Appendix D, p. 21):

> "... [w]e believe that § 118 does embrace the Alabama permit requirement. Having reached this conclusion, the Supremacy Clause is inapplicable because Congress has authorized subjecting federal facilities to the state regulation involved. . . . Section 118 adequately meets the requirement that Congress 'affirmatively declare its instrumentalities or property subject to [state] regulation. . . .' "

With regard to sovereign immunity the same con-

clusion is inescapable; if Federal facilities "shall comply" with a requirements it is absolutely necessary that there be a remedy for non-compliance. In this regard the Sixth Circuit relied heavily on Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2, but Section 304 is expressly limited to suits for violation of an "emission standard or limitation." Further, this section was designed for use by "citizens" not by regulatory bodies. As stated in *Seeber* (Appendix D, p. 23):

> "Even assuming that a state is technically a 'person' entitled to sue under § 304, see Kentucky v. Ruckelshaus, *supra,* and that § 304 does not authorize suits for violation of permit requirements, it does not follow that § 118 does not authorize such suits."

The conflicting interpretations of Section 118 and the Clean Air Act as a whole rendered by the Fifth and Sixth Circuits has created an intolerable situation in the National effort to control and abate air pollution. While the Fifth Circuit has agreed that Alabama's permit requirement is the *central mechanism* by which that state may meet its responsibilities under the Act (Appendix D, p. 10), the Sixth Circuit has ruled that an identical requirement in Kentucky is merely a "procedural" requirement outside the mandate of Section 118. This is not a trifling conflict for it means that Alabama and other states in the Fifth Circuit may assume their proper regulatory function but that states in the Sixth Circuit, including Kentucky, are denied the regulatory powers granted in the Clean Air Act. So long as Kentucky is denied the use of its central control and enforcement mechanism it will be severely hampered in meeting its responsibilities under

the Act. And so long as the permit issue remains in conflict the Act can be neither effectively nor uniformly administered throughout the United States.

We urge that the resolution of this conflict receive the prompt attention of the United States Supreme Court.

Respecfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Room 114, Capitol Building
Frankfort, Kentucky 40601
(Telephone [502] 564-7600)

DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Room 26, Capitol Building
Frankfort, Kentucky 40601
(Telephone [502] 564-3595)

COUNSEL FOR PETITIONER.

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the foregoing SUPPLEMENTAL MEMORANDUM was served by mailing true copies hereof via United States mail, postage prepaid, to: Honorable William B. Saxbe, The Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Walter Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Martin Green, Section Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530; Honorable James A. Glasgow, Attorney, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Robert L. Klarquist, Attorney, Appelate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United State Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Jacques B. Gelin, Attorney, Appellate Section, Department of Justice, Washington, D. C. 20530; Honorable Kent Frizzell, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Herbert S. Sanger, Jr.,

Deputy General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Robert H. Marquis, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Beauchamp E. Brogan, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Justin M. Schwamm, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Evelle Younger, Attorney General, State of California, Honorable Foster Knight, Deputy Attorney General, State of California, Honorable Robert H. O'Brien, Assistant Attorney General, State of California, Honorable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable John J. Hill, Attorney General, State of Texas, Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas 78711; and Honorable James F. Gordon, United States District Judge, Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, Honorable Pierce Lively, Circuit Judge, United States Court of Appeals For the Sixth Circuit, and Honorable Lester L. Cecil, Senior Circuit Judge.

United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio 45202, all this the 1 day of November, 1974.

David D. Beals

DAVID D. BEALS
Assistant Attorney General
Commonwealth of Kentucky

APPENDIX

APPENDIX "D"

STATE OF ALABAMA and Alabama Air Pollution Control Commission ex rel. William J. Baxley, Attorney General, Plaintiffs-Appellants,

v.

Lynn SEEBER, General Manager of Tennessee Valley Authority, et al., Defendants-Appellees.

No. 73-2760.

United States Court of Appeals, Fifth Circuit.

Oct. 14, 1974.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, SIMPSON and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

Plaintiffs appeal from a summary judgment denying declaratory and injunctive relief and holding that 42 U.S.C. § 1857f, § 118 of the Clean Air Act Amendments of 1970 (the Act), does not require defendants to comply with a state requirement, previously approved by the Environmental Protection Agency, that a written permit

be obtained for the operation of equipment causing air pollution. Plaintiffs are the State of Alabama and the Alabama Air Pollution Control Commission (the Commission). Defendants are the Tennessee Valley Authority and various TVA officials (hereinafter "TVA"), and various officers and agencies of the United States Army (hereinafter "the Army").[1]

Rule 1.12 of the Commission, provisions of which are set out in the margin,[2] requires obtaining from that body

---

1. In the District Court the defendants also included officials of the Environmental Protection Agency. The District Court dismissed the complaint as to them, and plaintiffs do not appeal therefrom.

2. 1.12 Permits.

1.12.1 Permits Required.

(a) Permit to Construct. Any person building, erecting, altering or replacing any article, machine, equipment or other contrivance, the use of which may cause the issuance of or an increase in the issuance of air contaminants or the use of which may eliminate or reduce or control the issuance of air contaminants, shall first obtain authorization for such construction from the Director in the form of a Permit to Construct. A Permit to Construct shall remain in effect until the permit to operate the equipment for which the application was filed is granted or denied or the application is canceled.

(b) Permit to Operate.

(1) Before any article, machine, equipment or other contrivance described in paragraph (a) may be operated or used, a written permit shall be obtained from the Director.

a written permit for the operation of any equipment the use of which may cause an increase in air pollution. This rule is a part of the implementation plan for the control

---

No permit to operate shall be granted for any article, machine, equipment or contrivance described in paragraph (a), constructed or installed without authorization as required by paragraph (a), until the information required as presented to the Director and such article, machine, equipment or contrivance is altered, if necessary, and made to conform to the standards established by the Commission.

(2) Any article, machine, equipment or other contrivance described in paragraph (a) which is presently operating (or which is not presently operating but which is capable of being operated) without a Permit to Operate, may continue to operate (or may restart) only if its owner or operator obtains a Permit to Operate prior to a date to be set by the Director (or prior to restarting).

(3) The Director shall have the authority to decide cases where an article, machine, equipment, or other contrivance is not clearly subject to nor exempt from the application of this Part. In addition, the Director may rule that a particular article, machine, equipment or other contrivance is subject to the application of this Part even though it is exempt from the system according to Sections 1.12.1 and 1.12.2 of this Part. The operator or builder of such an article, a machine, equipment or other contrivance may appeal the Director's classification to the Commission, which shall overrule the Director only if it is shown that he acted arbitrarily and contrary to the purpose of the Act.

* * * * * * * * * *

(b) The Director shall deny a permit if the applicant does not present, in writing, a plan whereby the emission of air contaminants by every article, machine, equipment,

of air pollution formulated by Alabama and approved by the Administrator of EPA in accordance with § 110 of the Act [42 U.S.C. §1857c-5]. See 37 Fed.Reg. 10847-10848

---

or other contrivance described in the permit application, will be reduced during periods of an Air Pollution Alert, Air Pollution Warning, and Air Pollution Emergency in accordance with the provisions of Chapter 2.

(c) Before a Permit to Construct or Permit to Operate is granted, the Director may require the applicant to provide and maintain such facilities as are necessary for sampling and testing purposes in order to secure information that will disclose the nature, extent, quantity or degree of air contaminants discharged into the atmosphere from the article, machine, equipment or other contrivance described in the Permit to Construct or Permit to Operate. In the event of such a requirement, the Director shall notify the applicant in writing of the required size, number and location of the sampling platform; the access to the sampling platform; and the utilities for operating the sampling and testing equipment.

(d) The Director may also require the applicant to install, use and maintain such monitoring equipment or methods; sample such emissions in accordance with such methods, at such locations, intervals and procedures as may be specified; and provide such information as the Director may require.

1.12.7 Provision of Sampling and Testing Facilities. A person operating or using any article, machine, equipment or other contrivance for which these rules and regulations require a permit shall provide and maintain such sampling and testing facilities as specified in the Permit to Construct or Permit to Operate.

1.12.8 Standards for Granting Applications.

(a) The Director shall deny a permit except as provided

(1972). Defendants have supplied information concerning their emissions of air pollutants to the Commission

---

by Section 1.12.9, if the applicant does not show that every article, machine, equipment or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it may be expected to operate without emitting or without causing to be emitted air contaminants in violation of these rules and regulations.

* * * * * * * * * * *

(h) In granting any Permit to Operate, the Director may allow, as a condition of such permit, for the intermittent discharge of air contaminants, during startup, shut down, rate change or load change, in excess of the limitations specified in these rules and regulations where he finds that because of the nature of the source there is no practicable alternative.

1.12.9 Conditional Permit.

(a) The Director may issue a Permit to Construct or a Permit to Operate subject to conditions which will bring the operation of any article, machine, equipment or other contrivance within the standards of Section 1.12.8, in which case the conditions shall be specified in writing. Commencing work under such a Permit to Construct or a Permit to Operate shall be deemed acceptance of all the conditions specified. The Director shall issue a Permit to Construct or a Permit to Operate with revised conditions upon receipt of a new application, if the applicant demonstrates that the article, machine, equipment or other contrivance can operate within the standards of Section 1.12.8 under the revised conditions.

(b) A Conditional Permit may allow an article, machine, equipment or other contrivance to be operated in violation of

and have taken steps to abate those emissions, but they refuse to apply for permits in the belief that the Act

---

the conditions of Section 1.12.8 if one of the conditions of the permit is a definite schedule by which the article, machine, equipment, or contrivance may attain the conditions of Section 1.12.8 and be granted a Permit to Operate, and if the schedule provides for attaining the conditions of Section 1.12.8 at the earliest possible date and is approved by the Director. A Conditional Permit will be revoked if the applicant does not submit progress reports to the Director according to the schedule established by the Conditional Permit. The Director may further revoke the Conditional Permit if the progress reports do not show satisfactory progress as specified by the terms of the Conditional Permit or if the progress reports are found to be inaccurate.

* * * * * * * * * *

1.12.11 Denial of Application. In the event of denial of a Permit to Construct or Permit to Operate, the Director shall notify the applicant in writing of the reason therefor. Service of this notification may be made in person or by mail, and such service may be proved by the written acknowledgement of the persons served or affidavit of the person making the service. The Director shall not accept a further application unless the applicant has complied with the objections specified by the Director as its reasons for denial of the Permit to Construct or the Permit to Operate.

1.12.12 Appeals. Within 10 days after notice by the Director of denial or conditional approval of a Permit to Construct or Permit to Operate, the applicant may petition the Commission, in writing, for a review. The Commission may sustain or reverse the action of the Director; such order may be made subject to specified conditions.

1.12.13 The holder of a Permit under this Part shall comply with conditions contained in such Permit as well as all applicable provisions of these rules and regulations except where violations are specifically allowed in accordance with a Conditional Permit issued under Section 1.12.9.

does not subject them to the Rule 1.12 permit requirement. We must interpret the Act, and particularly §118, in order to determine whether that refusal is justified.[3] We conclude that it is not. In doing so we reach a result contrary to decisions of the Sixth Circuit, Kentucky v. Ruckelshaus, 497 F.2d 1172 (CA6, 1974), and the District Court for the Central District of California, California v. Stastny, —— F.Supp. —— (C.D.Cal.1972), appeal docketed, No. 72-2905, CA9, Nov. 6, 1972. The *Stastny* decision states a conclusion without explication of the supporting analysis. Our reasons for reaching a conclusion different from the Sixth Circuit appear below

I. Interpretation of § 118

[1] Section 118 of the Act [42 U.S.C. § 1857f] provides:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of

---

3. We are left to guess at the District Court's reasons for its order granting summary judgment since it gave none. See Steed v. Central of Ga. Ry. Co., 477 F.2d 1303, 1305 (CA5, 1973), as to the desirability of the court's stating its grounds though not required by Rule 56 to do so. Especially is that true in a case of such national importance as this. Amici curiae filing briefs in this court include the states of California, Kentucky, Maine, New York, Ohio and Texas.

the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall before a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

The phrase "shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such

requirements" effectively conveys a Congressional intent that federal facilities are to be treated equally with private facilities in the scheme of control established by the Act. Recognizing that in particular instances such treatment might prove inconsistent with the national interest, the section provides for executive exemption from any requirement.

[2] The scheme of the Act as a whole also supports the conclusion that federal facilities are subject to the Alabama permit requirement. With respect to existing stationary sources of air pollution the Act places the primary responsibility for setting and enforcing emission standards or limitations on the states. EPA, pursuant to § 109 of the Act [42 U.S.C. § 1857c-4] establishes primary and secondary ambient air quality standards, and the states, pursuant to § 110 [42 U.S.C. § 1857c-5] establish, subject to approval by EPA, implementation plans geared to meeting the air quality standards. Such implementation plans include, inter alia, "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance" of the air quality standards, provisions "for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality," and "necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan." § 110(a)(2)(B), (C) & (F). The Alabama permit requirement is a part

of the Alabama implementation plan previously approved in accordance with the provisions of § 110. Indeed, as inspection of the rule itself indicates, it is not only a part of the implementation plan but appears to be the central mechanism by which the Alabama plan provides for the gathering of information and the enforcement of emission limitations necessary to achieve air quality standards.

Sections 111, 112, and 114 [42 U.S.C. §§ 1857c-6, 1857c-7, and 1857c-9] of the Act explicitly exempt certain federal facilities from state authority to enforce requirements established by EPA pursuant to those sections.[4]

---

4. Section 111 [41 U.S.C. § 1857c-6] provides for establishment by the Administrator of EPA of emission standards for new sources of air pollution. Subdivision (c)(1) of the section provides:

"Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards (except with respect to new sources owned or operated by the United States)."

Section 112 [42 U.S.C. § 1857c-7] provides for EPA establishment of emission standards for hazardous air pollutants not covered by ambient air quality standards. In language parallel to that contained in § 111(c)(1), subsection (d)(1) of § 112 provides for delegation of implementation and enforcement authority to the states "except with respect to

Those sections deal with specialized emission standards for new sources and hazardous pollutants and with recordkeeping, inspection and monitoring requirements established directly by EPA. In view of these explicit exemptions for federal facilities, particularly the exemptions in §§ 111 and 112, which like § 110 establish control schemes for certain classes of air pollution sources, the absence of any such exemption in § 110 suggests that the provisions of implementation plans adopted and approved pursuant to that section, including provisions for state enforcement of emission limitations through permit systems, are applicable to federal facilities.

[3] The general scheme that emerges from the Act as

---

stationary sources owned or operated by the United States."

Section 114 [42 U.S.C. § 1857c-9] provides in part:

"§ 1857c-9. Recordkeeping, inspections, monitoring, and entry—Authority of Administrator or authorized representative

"(a) For the purpose (i) of developing or assisting in the development of any implementation plan under section 1857c—5 or section 1857c—6(d) of this title, any standard of performance under section 1857c—6 of this title, or any emission standard under section 1857c—7 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out section 1857h—1 of this title—

(1) the Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment

a whole appears to be that responsibility and authority for enforcement with respect to federal facilities is granted to the states for sources with respect to which state implementation plans establish the criteria for enforcement, and is granted to EPA in those instances (*i. e.*, new sources and hazardous pollutants) where EPA establishes the criteria. The scheme is a reasonable one. Because of variations in air quality between states and regions the emissions criteria established under state plans may vary considerably, thus making enforcement by EPA against scattered federal facilities administratively difficult. The new source and hazardous pollutant criteria established by EPA, however, are not tied to air quality standards and may, therefore, vary little or not at all by area, mak-

---

or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which the owner or operator of such source is required to sample under paragraph (1).

ing EPA enforcement against federal facilities more convenient.

The Congressional purpose in enacting § 118 supports our reading of the Act. The legislative history indicates that Congressional displeasure with the performance of federal facilities under the then existing provisions of the Air Quality Act of 1967 prompted the enactment of § 118. In hearings on the Clean Air Amendments of 1970, the Senate Public Works Committee found "many incidents of flagrant violation of air and water pollution standards by Federal facilities;" S.Rep. No. 91—1196, 91st Cong., 2d Sess., at 23 (1970). Additionally the Committee noted,

> Federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures. . . .
>
> *Enforcement procedure by State; delegation of authority of Administrator to State; power of Administrator unaffected*
>
> "(b)(1) Each state may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section (except with respect to new sources owned or operated by the United States)."

Id. at 37. See also, H.Rept. No. 91—1146, 91st Cong., 2d Sess., in 1970 U.S.Code Cong. & Admin.News at 5360. Section 111 of the prior Act relied primarily on voluntary

compliance by federal facilities. In strengthening the Act by replacing that section with present § 118 Congress sought to depart from the policy of voluntary compliance and make emission limitations enforceable against federal facilities. With respect to existing sources the Act places upon the states primary responsibility for establishing and enforcing emission limitations, and Alabama, like many other states, relies on a permit system as its method of enforcement as well as a method of generating information concerning emissions. To deny the applicability to federal facilities of that permit requirement would be tantamount to a return to the Congressionally-rejected policy of voluntary compliance by federal facilities.[5] Moreover a holding that § 118 does not embrace permit systems would represent a retreat from the provisions of prior § 111. That section allowed the Secretary of HEW to establish classes of pollution sources for which federal facilities could be required to obtain a permit from the Secretary. Since § 118 does not distinguish between federal and state requirements, holding state permit systems outside the scope of § 118 would imply the same conclusion with respect to any federal permit system.

5. Defendants argue that the state could seek to enforce its emission limitations by resort to court actions under the "citizens suits" provision, § 304 [42 U.S.C. §1857h-2] of the Act. Irrespective of the merits of this suggestion, we believe that § 304 provides little guidance to determining the Congressional purpose in enacting § 118. Our reasons are discussed in Part III infra.

The result would be that the Administrator of EPA (who assumed responsibility for air pollution control activities when EPA was established) could not under the stronger § 118 do what the Secretary of HEW was explicitly entitled to do under the prior § 111.

Defendants seek to avoid the impact of § 118 by engrafting upon it a substantive-procedural overlay. They argue that the phrase "requirements respecting control and abatement of air pollution" means only requirements such as emission standards and limitations, which they label "substantive," and does not include mechanisms, *e. g.*, permit systems, for enforcing these requirements.[6] Having affixed these new labels, defendants would have us infer that while federal agencies must, and will, comply with the "substantive," it was not intended that they be bound by the "procedural," a term which in defendants' construct is sub-silentio pejorative, impliedly denigrating the Congressionally-mandated mechanisms of enforcement to a status of less dignity and import. This recharacterization of the statutory scheme is a semantical red herring. It draws no sustenance from the Act itself. No such limitation is apparent from the words of § 118. Moreover the language of § 116 [42 U.S.C. § 1857d-1] is inconsistent with defendants' reading of "requirements."

6. This approach necessarily leads them to de-emphasize the remainder of the phrase, which reads "to the same extent that any person is subject to such requirements."

There Congress used words identical to the § 118 "requirements" phrase.

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . .

The "or" in § 116 is clearly disjunctive. Therefore, contrary to the position of the defendants, "requirements" must include more then emission standards or limitations. Finally if § 118 did not extend to enforcement mechanisms, it would be difficult to understand why Congress explicitly afforded exemptions from state enforcement in §§ 111 and 112. Both sections provide that if the Administrator finds a state-developed procedure for implementing and enforcing the emission standards and limitations developed by EPA under those sections adequate, "he shall delegate to such State any authority he has under this chapter to implement and enforce such standards" except with respect to federal facilities. If § 118 did not include enforcement mechanisms, there would be no need for these exemptions.

In Kentucky v. Ruckelshaus, *supra*, the Sixth Circuit picked up the defendants' substantive-procedural recharacterization and held that § 118 is limited to "substantive" requirements, a category from which it excluded permit systems. As we read its opinion, that court's conclusions rest on these factors: the ability of states to sue federal

facilities under § 304 [42 U.S.C. § 1857h-2] of the Act; statements contained in the legislative history; and the lack of support in Executive Orders for the contention that § 118 includes "procedural" permit requirements. With deference, we find these factors unconvincing. The inference from § 304 is discussed *infra* at Part III; the legislative history is discussed below in this section of our opinion; and Executive Order No. 11752 is discussed *infra* at Part IV.[7]

Defendants' principal attempt to justify their position, and one of the factors relied on by the Sixth Circuit in its decision, consists of what seems to us a strained reading of the Act's legislative history. They rely on the brief summary of § 118 contained in the Conference Report, H.Rep. No. 91-1783, 91st Cong., 2d Sess., at 48 (1970), U.S.Code Cong. & Admin.New, p. 5381, which reads, "The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions." Taken in isolation this statement would seem to suggest that "requirements" means emission limitations, but other factors lead us to assign it little weight. In response to the problem of inadequate compliance by federal facilities

---

7. The Sixth Circuit also noted the "lack of support" for plaintiffs' interpretation of § 118 in Executive Order No. 11507. That Order was promulgated in February 1970, while the Clean Air Act Amendments were not approved until December 31, 1970.

with air pollution control measures the House of Representatives passed H.R. 17255 requiring that federal facilities "comply with applicable Federal, State, interstate, and local emission standards and with the purposes of this Act. . . ." The bill passed by the Senate, S. 4358, however, stated that federal facilities "shall comply with the requirements of this Act in the same manner as any person must so comply. . . ." As reported by the Conference and as enacted in Public Law 91-604, the final provision requires that federal facilities "comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." The change from "emission standards" in H.R. 17255 to "requirements" in the final version supports the more inclusive view of § 118. Given the change in language from "emission standards" in the House bill to "requirements" in the final version, the apparent attempt to put federal facilities on the same footing as any other person, the lack of any apparent limitation in the language of § 118 itself or any discussion of such a limitation anywhere in the legislative history, and the scheme of the Act as a whole, we believe that the Conference Report statement is more accurately read as a statement of the ultimate goal of the provision rather than as a road map of how to get there. No one disputes that the goal of § 118 is to assure compliance by federal facilities with air quality and emission standards. The question is rather whether Congress intended that the enforcement mechanisms of federally

approved state implementation plans, in this case permit systems, would be used as a method of achieving this goal. And with regard to this question the legislative history, except to the extent that it reveals the Congressional purpose discussed earlier, is ambiguous.[8] Confronted with this ambiguity, we rely on the words of § 118, the scheme of the Act as a whole, and what we discern to be the Congressional purpose, as the best guides to interpreting the section.

Finally defendants suggest that allowing states to

---

8. Other bits and pieces of legislative history are similarly inconclusive. Some statements resemble the Conference Report statement quoted in the text. See Library of Congress for the Senate Comm. on Public Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970 (Comm. Print 1974) at 423 (S.Rep. No. 91-1196, *supra*, at 23; "This section requires that Federal facilities meet the emission standards necessary to achieve ambient air quality standards as well as those established in other sections of Title I."); 894 (H.Rep. No. 91-1146, *supra*: "The legislation directs Federal agencies . . . to comply with applicable Federal, State, interstate, and local emission standards."); 904-905 (H.Rep. No. 91-1146, *supra*: statement paralleling that cited at 894.). Other statements appear to imply that § 118 should be given an expansive interpretation. *See Id.* at 131 (Sen. Muskie's Summary of the Conference Agreement: "The agreement requires Federal facilities to control air pollution."); 459 (S.Rep. No. 91-1196, *supra*, at 59: "This section directs that all Federal agencies shall comply with the requirements of the Act just as a nonfederal agency or individual must do in the adminisration of any real property or facility and in the conduct of any activity.").

subject federal facilities to the procedural requirements contained in state implementation plans would be unduly burdensome. This argument is substantially undermined by the defendants' contention that even absent subjection to the permit requirement they are bound to, and will, comply with substantive emission limitations, compliance schedules, information gathering and monitoring requirements. Some burden may remain, but under the scheme enacted by Congress determination of whether that burden is undue, and relief if it is, is a matter for executive rather than judicial decision. Section 118 itself authorizes the President to exempt federal facilities from any state requirement "if he determines it to be in the paramount interest of the United States to do so."[9]

II. The Supremacy Clause

[4] The TVA defendants do not claim sovereign immunity from suit but do claim that TVA, as an "agency and instrumentality of the federal government," is exempted from state regulation by the Supremacy Clause, Art. VI, Clause 2 of the United States Constitution. The Army similarly invokes the clause. On the strength of this argument, the Sixth Circuit recently held in Kentucky v. Ruckelshaus, *supra*, that Kentucky cannot compel TVA's compliance with a Kentucky air pollution control permit sy-

---

9. Except that he may not grant an exemption "due to lack of appropriation" unless the appropriation was requested by the President and denied by the Congress.

stem. That holding was premised on the Sixth Circuit's conclusion that § 118 was limited to "substantive" requirements and thus did not authorize subjecting federal facilities to the Kentucky permit requirements. Absent the § 118 authorization, the Supremacy Clause barred state enforcement of the requirement. Given the premise, we would not disagree with the conclusion. It is on the proper interpretation of § 118 that we part company with the Sixth Circuit. For the reasons explicated in Part I *supra*, we believe that § 118 does embrace the Alabama permit requirement. Having reached this conclusion, the Supremacy Clause is inapplicable because Congress has authorized subjecting federal facilities to the state regulation involved. "It lies within Congressional power to authorize regulation . . . by the state of federal instrumentalities." Mayo v. United States, 319 U.S. 441, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1948). Section 118 adequately meets the requirement that Congress "affirmatively declare its instrumentalities or property subject to [state] regulation. . . ." *Id.* at 448, 63 S.Ct. at 1141, 87 L.Ed. at 1509. *Cf.* Baltimore National Bank v. State Tax Commission, 297 U.S. 209, 56 S.Ct. 417, 80 L.Ed. 586 (1936). Moreover, it is at least arguable that the regulation involved here is as much federal regulation as state. The Alabama permit requirement was included in an implementation plan approved by EPA under § 110 of the Act. The Act gives EPA power to enforce any implementation plan requirements. § 113, and also provides for citizen suits in federal courts to enforce at least some

such requirements, § 304. Neither of these provisions is consistent with the view that the components of approved implementation plans are exclusively state regulations.

III. Sovereign Immunity

[5] Distinct from the Supremacy Clause issue, the Army defendants argue that as against them this action is barred by the sovereign immunity of the United States from suit. Our determination of the meaning of § 118 also forecloses this contention. That section states that federal facilities "shall comply" with state "requirements respecting control and abatement of air pollution," a phrase which we interpret to include the Alabama permit requirement. This statement occurs in the context of an Act which relies in the first instance on state enforcement of such requirements after their approval by EPA.[10] Little or no inference is required to conclude that § 118 embodies a waiver of sovereign immunity with respect to federal facilities. A contrary result would render largely meaningless our conclusion as to the scope of § 118 and herald a return to the policy of voluntary compliance which Congress sought to change by enacting that section.

---

10. Thus, § 101(a)(3) declares "the prevention and control of air pollution at its source is the primary responsibilty of States and local governments . . .," and § 110(a)(2)(F)(i) requires state implementation plans to contain "assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan."

The defendants contend in an argument accepted by the Sixth Circuit that § 304 authorizes suits against the United States for violation of an "emission standard or limitation," as therein defined, or an order with respect thereto; that it does not authorize suits for failure to comply with permit requirements; and that, therefore, we should infer that Congress did not consent to suits against federal facilities regarding permit requirements. The argument is unconvincing. Even assuming that a state is technically a "person" entitled to sue under § 304, see Kentucky v. Ruckelshaus, *supra*, and that § 304 does not authorize suits for violation of permit requirements, it does not follow that § 118 does not authorize such suits. The "Citizens Suits" heading of § 304, the fact that § 304(d) provides for awarding attorney fees, and the legislative history of the section[11] demonstrate that the congressional focus in enacting that provision was on suits by private parties. Consequently, we believe that § 304 cannot be properly read as implying anything about the ability of states to sue under § 118.

IV. Executive Order No. 11752

[6] Alabama initially sought to rely on language contained in Executive Order No. 11507, 35 Fed.Reg. 2573

---

11. See e. g., A Legislative History of the Clean Air Amendments of 1970, note 8, supra, at 127 (Remarks of Sen. Muskie on the Conference Report: "The bill extended the concept of public participation to the enforcement process."); 205-206 (Conference Report); 436-439 (Senate Report).

(1970), note following 42 U.S.C.A. § 4331 (1973), as an alternative basis for requiring federal facilities to comply with the state permit requirement. That Order has since been superseded by Executive Order No. 11752, 38 Fed. Reg. 34793 (1973), note following 42 U.S.C.A. § 4331 (Supp.1974), which includes the following statement:

> *Section 1. Policy.* It is the purpose of this order to assure that the Federal Government, in the design, construction, management, operation, and maintenance of its facilities, shall provide leadership in the nationwide effort to protect and enhance the quality of our air, water, and land resources through compliance with applicable standards for the prevention, control, and abatement of environmental pollution in full cooperation with State and local governments. Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplsh the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local adminstrative procedures with respect to pollution abatement and control.

The new Executive Order will not support the plaintiffs' argument. But it does not foreclose the argument based on § 118. While the Order seeks to further "the purpose and policies of the Clean Air Act," it does not purport to be an authoriative administrative interpretation of that section[12] but is instead an independent order based on the executive authority of the President over federal employees and facilities. It cannot, of course, modify an Act of Congress, nor does it appear to be an exercise of the authority granted the President under § 118 to exempt federal facilities from certain requirements. Exercise of

---

12. TVA contends that EPA has officially interpreted § 118 as not requiring federal facilities to comply with state permit requirements. TVA refers us to a 1972 letter to it from the Regional Administrator of EPA and a 1973 memorandum to federal departments and agencies from the Administrator. These documents indicate an EPA position that federal facilities need not obtain permits, a fact which we have duly noted in reaching our decision, but because they offer no reasoning to support that position, they provide slight guidance. The 1973 memorandum, moreover, contains the following statement:

> "[I]f a State's compliance schedule process is based on a permit system, I would ask that your facilities provide the State with the required information on its registration form. I believe the form should be signed to verify the data, but with an appropriate disclaimer to make it clear that the facility is not applying for a permit. (If you have instructed your facilities to apply for a State permit, the disclaimer would, of course, be unnecessary.) As you know, there are several court cases now underway to determine the legality of State permits for Federal facilities. I believe that while the courts resolve this issue the Federal government should proceed with great urgency to ensure that every source in violation of air quality standards and emission limitations is covered

that authority contemplates a case by case determination that the exemption is "in the paramount interest of the United States." It does not authorize a blanket exemption of all federal facilities from specified requirements, and we do not construe Executive Order 11752 as an attempt to provide such an exemption.[13]

The judgment of the District Court is reversed and

---

by an approved compliance schedule and that resources and funds are marshalled in order to adhere to these schedules."

The parenthetical statement seems to imply that EPA does not oppose in principle requiring state permits for federal facilities, and the reference to cases under way appears to indicate an attitude of deferring to the courts on the proper interpretation of § 118.

13. The Executive Order itself appears to recognize the necessity for a case by case determination. Section 5 thereof delegates to the heads of federal agencies and the Administrator of EPA the power to "identify facilities or uses thereof" which are exempted from air qualtiy standards and emission limitations effective under the Clean Air Act and applicable under Section 4 of the Executive Order. Exercise of this power of exemption with respect to a facility would render moot any state permit requirement with respect to that facility since the necessity for a permit derives from the emission limitation requirement.

1. See also People of Sate of Calfornia v. Captain Stastny, C.O. of Long Beach Naval Air State, C.D.Cal.1972, —— F.Supp. ——, presently pending on appeal to the Ninth Circuit, appeal docketed November 6, 1972, No. 72-2905.

the cause remanded for further proceedings not inconsistent with this opinion.

SIMPSON, Circuit Judge (dissenting):

With deference, I dissent. I would affirm the district court on the authority of the Sixth Circuit decision, Commonwealth of Kentucky ex rel. Hancock v Ruckelshaus, Administrator, etc., et al., 6 Cir. 1974, 497 F.2d 1172,[1] affirming Commonwealth of Kentucky ex rel. Hancock v. Fri, W.D.Ky.1973, 362 F.Supp. 360.

Without a clearer expression than I discern either in Section 118 [Title 42, U.S.C. § 1857f] or in the Act's inconclusive legislative history, I am unwilling to attribute to Congress an implied consent for the several states to apply state permit requirements to facilities operated within their borders by agencies and instrumentalities of the federal government, here specifically the Department of th Army and The Tennessee Valley Authority. Speculation and conjecture, however persuasively set forth, should not override the Supremacy Clause, Art. VI, Clause 2, of the United States Constitution.

Supreme Court, U. S.
FILED
APR 30 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK, ATTORNEY GENERAL ..... PETITIONER

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL ..... RESPONDENTS

APPENDIX

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 3, 1974
CERTIORARI GRANTED MARCH 17, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK, ATTORNEY GENERAL .. PETITIONER

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL ..... RESPONDENTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INDEX

Table of Contents

	Page
Chronological List of Relevant Docket Entries	iv
Chronological List of Other Parts of Record	vi
COMPLAINT, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY	1
Exhibit D	35
Exhibit E	55
MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE BY ATTORNEY GENERAL, COMMONWEALTH OF VIRGINIA	60
ORDER PERMITTING COMMONWEALTH OF VIRGINIA TO APPEAR AS AMICUS CURIAE	62
MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT FILED BY DEFENDANTS TENNESSEE VALLEY AUTHORITY ET AL	63

INDEX (Continued)
Table of Contents

Page

Exhibit 1 65
Exhibit A 69
Exhibit B 72
Exhibit C 73
Exhibit D 76
Exhibit E 77

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT FILED BY ALL DEFENDANTS REPRESENTED BY UNITED STATES DEPARTMENT OF JUSTICE (ALL DEFENDANTS WITH EXCEPTION OF TENNESSEE VALLEY AUTHORITY, WAGNER, SEEBER, McPHERSON AND CAVANISS) 86

Affidavit of Robert J. Hart 89
Affidavit of Jerome F. Wing 94
Supplemental Affidavit of Jerome F. Wing 99
Affidavit of E. D. H. Berry 102
Affidavit of Earnest A. Vuley, Jr. 107
Affidavit of Robert Anderson 110

MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS TENNESSEE VALLEY AUTHORITY, WAGNER, SEEBER, McPHERSON, AND CAVANISS FILED BY ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY 115

Exhibit 1, Affidavit of Harold G. Peters 117
Affidavit of John T. Smithers 120

ORDER SETTING ALL MOTIONS FOR ORAL ARGUMENT 124

MOTION TO FILE SUPPLEMENTAL BRIEF FILED BY ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY 125

INDEX (Continued)
Table of Contents

Page

ORDER SUSTAINING ALL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT 127

MEMORANDUM AND ORDER SUSTAINING ALL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT 129

JUDGMENT SUSTAINING ALL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING ACTION 150

NOTICE OF APPEAL FROM JULY 11, 1973, ORDER AND AUGUST 13, JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY FILED BY ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY, IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 151

MOTION TO DEFER FILING OF APPENDIX FILED BY ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY 153

MOTION TO FILE AMICUS BRIEF OUT OF TIME FILED BY ATTORNEY GENERAL, STATE OF TEXAS 155

NOTICE OF COURT SETTING ORAL ARGUMENTS 171

OPINION AFFIRMING JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY 170

INDEX (Continued)
Table of Contents

Page

JUDGMENT AFFIRMING JUDGMENT OF UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF KENTUCKY 172

MANDATE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 173

ORDER, UNITED STATES SUPREME COURT, GRANTING PETITION FOR WRIT OF CERTIORARI FILED BY ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY ON SEPTEMBER 3, 1974 174

DOCKET ENTRIES
CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date Page

11-16-72 Complaint filed by Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, in the United States District Court For the Western District of Kentucky, Civil Action No. 7480-G, omitting Exhibit A (The Clean Air Act, December, 1970, 42 U.S.C. 1857 et seq.), Omitting Exhibit B (Administrative Regulations, Kentucky Air Pollution Control Commission), Omitting Exhibit C (Federal Register, Volume 37, No. 105, Title 40, Chapter I, Subchapter 52), and including Exhibit D (Request letters to defendants

DOCKET ENTRIES (Continued)
CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date Page

and refusals), including Exhibit E (Directive from Regional Administrator, Environmental Protection Agency) 1

1-18-73 Motion For Leave to Appear as Amicus Curiae filed by Andrew P. Miller, Attorney General, Commonwealth of Virginia 60

2- 5-73 Order entered permitting Commonwealth of Virginia to appear as amicus curiae 62

3- 5-73 Motion to Dismiss or in the Alternative For Summary Judgment filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson, and Cavaniss, including Exhibit 1 (Affidavit of Lynn Seeber, Exhibit A, 8-14-72 letter, Exhibit B, 10-13-72 letter, Exhibit C, 11-10-72 letter, Exhibit D, 11-29-72 letter, Exhibit E, 1-9-73 letter, Exhibit F, 10-17-72 letter, Exhibit G, 1-26-73 memorandum 63

3-16-73 Motion to Dismiss or in the Alternative For Summary Judgment filed by all defendants represented by United States Department of Justice (all defendants with exception of Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss), including

DOCKET ENTRIES (Continued)
CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Date — Page

Exhibits 1-6, Affidavit of Robert J. Hart, Affidavit of Jerome F. Wing, Supplemental Affidavit of Jerome F. Wing, Affidavit of E. D. H. Berry, Affidavit of Earnest A. Vuley, Jr., and Affidavit of Robert Anderson 86

3-27-73 Motion for Summary Judgment against Defendants Tennessee Valley Authority, Wagner, Seeber, McPherson, and Cavaniss filed by plaintiff Ed W. Hancock, Attorney General, Commonwealth of Kentucky, including Exhibit 1, Affidavit of Harold G. Peters, and Affidavit of John T. Smithers, including 8-14-72 TVA letter attachment to Smithers Affidavit and omitting completed, unsigned permit application of TVA to operate air contaminant sources attachment to Smithers Affidavit 115

6-13-73 Order entered setting all Motions for Oral Argument on 7-9-73 124

6-28-73 Motion to File Supplemental Brief filed by Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General 125

7-11-73 Order entered in United States District

DOCKET ENTRIES (Continued)
CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

Date — Page

Court For the Western District of Kentucky sustaining all defendants' Motions for Summary Judgment 127

8-13-73 Memorandum and Order entered in United States District Court For the Western District of Kentucky sustaining all defendants' Motions for Summary Judgment and denying plaintiff's Motion for Summary Judgment 129

8-13-73 Order entered in United States District Court For the Western District of Kentucky overruling plaintiff's Motion For Summary Judgment, sustaining all defendant's Motions for Summary Judgment and dismissing action 150

9- 7-73 Notice of Appeal to the United States Court of Appeals For the Sixth Circuit from July 11, 1973 Order and August 13, 1973, Judgment of the United States District Court For the Western District of Kentucky filed by Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, No. 73-2099 ...151

12- 7-73 Motion to Defer Filing of Appendix to December 12, 1973, filed by plaintiff Com-

DOCKET ENTRIES (Continued)
CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date — Page

monwealth of Kentucky ex rel Ed W. Hancock, Attorney General. (Extension granted to 12-17-73) 153

3- 5-74 Motion To File Amicus Curiae Brief Out of Time filed by John L. Hill, Atttorney General, State of Texas. (Motion granted 3-18-74) 155

3-11-74 Notice of United States Court of Appeals For the Sixth Circuit setting oral arguments for April 8, 1974 171

6- 5-74 Opinion entered, United States Court of Appeals For the Sixth Circuit, affirming August 13, 1974, Judgment of the United States District Court For the Western District of Kentucky 172

7-11-74 Issued as Mandate, July 11, 1974, United States Court of Appeals For the Sixth Circuit [See Judgment immediately above] 173

3-17-75 Order entered United States Supreme Court, No. 74-220, granting petitioner's (Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General) Petition For Writ of Certiorari filed on September 3, 1974 174

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX

Date

1- 8-73 Motion For Extension of Time to Answer or Otherwise Plead filed by defendants represented by United States Department of Justice (all defendants with exception of Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss).

1-10-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' represented by United States Department of Justice Motion for Extension of Time to Answer or Otherwise Plead to March 5, 1973.

1-10-73 Motion For Extension of Time to Answer or Otherwise Plead filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson, and Cavaniss.

1-12-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' TVA, et al, Motion for Extension of Time to Answer or Otherwise Plead to March 5, 1973.

1-31-73 Response to Motion of Commonwealth of Virginia to Appear as Amicus Curiae filed by plaintiff Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

3- 6-73 Motion for Extension of Time to Answer or Otherwise Plead filed by defendants represented by United States Department of Justice.

3-7-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' represented by United States Department of Justice Motion For Extension of Time to Answer or Otherwise Plead to March 12, 1973.

3- 5-73 Brief in Support of Motion to Dismiss or for Summary Judgment filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

3-13-73 Motion For Extension of Time to Answer or Otherwise Plead filed by defendants represented by United States Department of Justice.

3-14-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' represented by United States Department of Justice Motion For Extension of Time to Answer or otherwise Plead to March 16, 1973.

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

3-16-73 Memorandum in Support of Motion to Dismiss filed by defendants represented by United States Department of Justice.

3-26-73 Motion For Extension of Time to File Brief In Opposition to TVA's Motion to Dismiss or For Summary Judgment filed by plaintiff Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

3-27-73 Order entered in United States District Court For the Western District of Kentucky granting plaintiff's Motion For Extension of Time to File Brief in Opposition to TVA's Motion to Dismiss or For Summary Judgment to March 28, 1973.

3-27-73 Brief in Support of Plaintiff's Motion For Summary Judgment against defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss and Brief in Opposition to defendants Tennessee Valley Authority, Wagner Seeber, McPherson and Cavaniss Motion to Dismiss or For Summary Judgment filed by plaintiff Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

4- 2-73 Brief in Opposition to Defendants' (Ruckelshaus, Environmental Protection Agency, Abrams Froehlke, Department of the Army, Desbory

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

Cushman, Vuley, Schlesinger, Atomic Energy Commission, Hollingsworth, Stiller, Union Carbide Corporation, Paducah Gaseous Diffusion Plant) Motion to Dismiss filed by plaintiff Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General.

4-16-73 Response to plaintiff's Motion for Summary Judgment filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

5- 2-73 Memorandum of Amicus Curiae Commonwealth of Virginia in Support of Plaintiff filed by Attorney General, Commonwealth of Virginia.

6-15-73 Supplement to Brief filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

6-28-73 Supplemental Brief filed by plaintiff Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

7- 9-73 *Oral Arguments,* United States District Court For The Western District of Kentucky.

7-26-73 Memorandum Opinion tendered by defendants

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

7-30-73 Memorandum tendered by defendants represented by United States Department of Justice.

9- 7-73 Motion to Dispense with Appeal Bond filed by Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

9-24-73 Order entered United States Court of Appeals for the Sixth Circuit exempting plaintiff-appellant Commonwealth of Kentucky from filing a bond for costs on appeal.

10-12-73 Record on Appeal Transmitted from United States District Court to United States Court of Appeals For the Sixth Circuit.

10-31-73 Record on Appeal docketed by United States Court of Appeals For the Sixth Circuit as No. 73-2099.

11- 2-73 Entry of Appearance by Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

11- 2-73 Appendix Designation by plaintiff-appellant Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General.

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

12- 4-73 Brief of California Attorney General as Amicus Curiae in Support of Appellant's Interpretation of the Clean Air Act filed by Attorney General, State of California.

12- 7-73 Order of United States Court of Appeals For the Sixth Circuit Deferring filing of Appendix to December 17, 1973.

12-11-73 Brief of Commonwealth of Virginia as Amicus Curiae in Support of Plaintiff-appellant filed by Attorney General, Commonwealth of Virginia.

12-14-73 Brief filed by appellant Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

12-14-73 Appendix filed by appellant Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

1- 8-74 Typewritten Brief filed by appellees represented by United States Department of Justice.

1-14-74 Brief filed by appellees Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

1-22-74 Brief filed by appellees represented by United States Department of Justice.

1-22-74 Reply Brief filed by appellant Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

3- 5-74 Brief of Amicus Curiae State of Texas in Support of Appellants filed by Attorney General, State of Texas.

3-18-74 Order granting State of Texas Motion to File Brief Out of Time.

4- 8-74 Oral Arguments, United States Court of Appeals For the Sixth Circuit.

9- 3-75 Petition For Writ of Certiorari filed by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, in United States Supreme Court, No. 74-220, for Review of Judgment of United States Court of Appeals For the Sixth Circuit rendered in proceedings on June 5, 1974.

9- 3-74 Petition For Writ of Certiorari docketed as No. 74-220.

CHRONOLOGICAL LIST OF OTHER PARTS OF RECORD NOT PRINTED IN APPENDIX (Continued)

Date

9- 3-75 Entry of appearance by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Atttorney General.

11- 1-74 Supplemental Memorandum filed by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

1-10-75 Memorandum for Respondents filed by respondents by Solicitor General. U. S. Department of Justice.

3-24-75 Request for transmittal of record from United States Court of Appeals For the Sixth Circuit.

3-27-75 Designation of Record to be included in Appendix and Statement of Issues filed by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

Filed — 11-16-72

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
LOUISVILLE, KENTUCKY

COMMONWEALTH OF KENTUCKY,
EX REL ED W. HANCOCK,
ATTORNEY GENERAL ..... PLAINTIFF,

VS:-

Civil Action
No. 7480-G

COMPLAINT

WILLIAM D. RUCKELHAUS, Administrator,
Environmental Protection Agency,
Waterside Mall, Fourth and M Streets,
Washington, D.C., 20460;

JACK E. RAVAN, ADMINISTRATOR,
REGION IV,
Environmental Protection Agency,
Suite 300, 1421 Peachtree Street, N.E.,
Atlanta, Georgia, 30309;

ENVIRONMENTAL PROTECTION AGENCY,
United States of America,
Waterside Mall, Fourth and M Streets,
Washington, D.C., 20460,
AND Also Serve for the above defendant agency:

Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,
and
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202;

GENERAL CREIGHTON ABRAMS, CHIEF OF STAFF,
United States Army, United States of America,
The Pentagon,
Washington, D.C., 20301,

ROGERT F. FROEHLKE, SECRETARY,
Department of the Army,
United States of America,
The Pentagon,
Washington, D.C., 20301;

MAJOR GENERAL W. R. DESBORY,
COMMANDING GENERAL,
United States Army Armor Center and Fort Knox,
Fort Knox, Kentucky, 40201;

MAJOR GENERAL JOHN CUSHMAN,
COMMANDING GENERAL,
101st. Airborne Division (Airmobile) and Fort Campbell, Fort Campbell, Kentucky, 42223;

COLONEL ERNEST A. VULVEY, JR.
COMMANDING OFFICER,
Lexington-Bluegrass Army Depot,
Department of the Army,
Lexington, Kentucky, 40507;

DEPARTMENT OF THE ARMY,
United States of America,
The Pentagon,
Washington, D.C., 20301,
AND Also Serve for the above defendant agency:
Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,
and
George J. Long,
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202;

AUBREY J. WAGNER, CHAIRMAN,
BOARD OF DIRECTORS,
Tennessee Valley Authority,
Woodward Building,
15th and H Streets, N.W.,
Washington, D. C., 20444;

LYNN SEEBER, GENERAL MANAGER
Tennessee Valley Authority,

Woodward Building,
15th and H Streets, N.W.,
Washington, D.C., 20444;

J. L. McPHERSON, SUPERINTENDENT,
SHAWNEE POWER PLANT
Tennessee Valley Authority,
Paducah, Kentucky, 42001;

T. E. CAVANISS, SUPERINTENDENT,
PARADISE POWER PLANT,
Tennessee Valley Authority,
Drakesboro, Kentucky, 42337;

TENNESSEE VALLEY AUTHORITY,
Woodward Building,
15th and H Streets, N.W.,
Washington, D.C., 20444,

and

Mussel Shoals, Alabama, 35660,
AND Also Serve for the above defendant agency:
Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,

and

George J. Long,
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202;

JAMES R. SCHLESINGER, CHAIRMAN,
BOARD OF DIRECTORS,
Atomic Energy Commission,
United States of America,
Washington, D.C., 20545;

ROBERT E. HOLLINGSWORTH,
GENERAL MANAGER,
Atomic Energy Commission,
United States of America,
Washington, D.C., 20545;

B. W. STILLER, MANAGER,
PADUCAH GASEOUS DIFFUSION PLANT,
Atomic Energy Commission,
United States of America,
Paducah, Kentucky, 42001;

UNION CARBIDE CORPORATION,
A New York Corporation,
Serve: C. T. Cororation System,
Kentucky Home Life Building,
Louisville, Kentucky, 40202;

ATOMIC ENERGY COMMISSION,
United States of America,
Washington, D.C., 20545,

and

Paducah Oak Ridge Operations,
Paducah, Kentucky, 42001,
AND Also Serve for the above defendant agency;

Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,
and
George J. Long,
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202, ...DEFENDANTS.

JURISDICTION

1. This action arises under the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States of America; U.S.C., Title 28, Section 1331; U.S.C., Title 42, Section 1857, et seq.; U.S.C., Title 5, Section 702; U.S.C., Title 28, Section 2201, et seq., and U.S.C. Title 28, Section 1361. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

2. Plaintiff Commonwealth of Kentucky brings this action by and through Ed W. Hancock, Attorney General for the Commonwealth of Kentucky, pursuant to Kentucky Revised Statutes 224.310, et seq., Kentucky Revised Statutes, Chapter 15, and Section 91 of the Constitution of the Commonwealth of Kentucky.

3. The United States of America has authorized

suit against the defendant agencies, divisions, and officers in their official capacities under U.S.C., Title 16, Section 831c and under the Clean Air Act of 1970, U.S.C., Title 42, Section 1857, et seq.

NATURE OF ACTIONS

4. This action arises out of the refusal of the defendants, Lynn Seeber, General Manager of the Tennessee Valley Authority; Aubrey J. Wagner, Chairman of the Board of Directors of the Tennessee Valley Authority; J. L. McPherson, Superintendent of the Shawnee Power Plant of the Tennessee Valley Authority; T. E. Cavaniss, Superintendent of the Paradise Power Plant of the Tennessee Valley Authority; the Tennessee Valley Authority; Major General W. R. Desbory, Commanding General of the United States Army Armor Center and Fort Knox; Colonel Ernest A. Vuley, Jr., Commanding Officer of the Lexington-Bluegrass Army Depot Major General John Cushman, Commanding General of the 101st. Airborne Division (Airmobile) and Fort Campbell; General Creighton Abrams, Chief of Staff of the United States Army; Robert F. Froehlke, Secretary of the United States Army; Department of the Army; James R. Schlesinger, Chairman of the Board of Directors of the United States Atomic Energy Commission; Robert E. Hollingsworth, General Manager of the United States Atomic Energy Commission; B. W. Stiller, Manager of the Paducah Gaseous Siffusion Plant of the United States Atomic Energy Commission; the United States Atomic Energy Commission; and Union Carbide Corporation, a New

York Corporation, operating the Paducah Gaseous Diffusion Plant of the United States Atomic Energy Commission, to apply for and obtain a permit from the Kentucky Air Pollution Control Commission as required by the Implementation Plan for the Attainment and Maintenance of the National and State Primary and Secondary Ambient Air Quality Standards for the Commonwealth of Kentucky, (hereinafter referred to as the "Kentucky Plan").

5. Section 5 of Kentucky Air Pollution Control Commission Administration Regulation AP-1, was promulgated by the Kentucky Air Pollution Control Commission under the provisions of Kentucky Revised Statutes 224.360 and Kentucky Revised Statutes 224,430, as required by the Commonwealth of Kentucky, (the rules and regulations of the Kentucky Air Pollution Control Commission are contained in Chapter 7 of "Kentucky's Plan"), by U.S.C., Title 42, Section 1857c-5, (hereinafter referred to as Section 110 of the Clean Air Act of 1970), Section 1857f, (hereinafter referred to as Section 118 of the Clean Air Act of 1970), and Section 1857c-8, (hereinafter referred to as Section 113 of the Clean Air Act of 1970). Collectively, Section 110, 118, and 113 of the Clean Air Act of 1970 make the "Kentucky Plan" with the rules and regulations of Chapter 7 in said Plan federal law for the attainment and maintenance of national ambient air quality standards for all federal agencies and facilities located within the Commonwealth of Kentucky.

6. This action arises out of the failure and refusal of defendants, William D. Ruckelshaus, Administrator of the Environmental Protection Agency; Jack E. Ravan, Administrator of Region IV of the Environmental Protection Agency, and the United States Environmental Protection Agency to institute appropriate actions under Section 113 of the Clean Air Act of 1970 against the defendants as set forth in paragraph numbered 4, herein, for compliance with the permit requirements of the "Kentucky Plan." Section 113 of the Clean Air Act of 1970 requires, that when any person is in violation of any applicable implementation plan and upon the failure or inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations of its Plan adopted pursuant to the Clean Air Act of 1970 the Administrator of the United States Environmental Protection Agency is to commence appropriate action toward obtaining compliance with the Plan.

PARTIES

7. Plaintiff, Commonwealth of Kentuky, is a sovereign state of the United States of America and brings this action on its own behalf as parens patriae. The plaintiff, Commonwealth of Kentucky brings this action as representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure. The members of the class, who are so numerous as to make it impracticable to bring them all before this Court, consist of the Commonwealth of Kentucky and all citizens, counties, political subdivisions, and agencies of the Commonwealth of Kentucky. All questions of law and of fact are common to the class; the claim of the plaintiff is typical of the class; and the plaintiff will fairly insure adequate representation of the class. Ed W. Hancock is

presently the duly elected Attorney General for the Commonwealth of Kentucky and as such Attorney General is the chief law officer of the Commonwealth of Kentucky. The authority of the Attorney General to commence this action in the name of the Commonwealth of Kentucky is based upon Section 91 of the Constitution of the Commonwealth of Kentucky, Chapter 15 of Kentucky Revised Statutes, and the common law, which gives him the authority to exercise all common law duties pertaining to the office of the Attorney General.

8. Defendant Tennessee Valley Authority, hereinafter referred to as "TVA", was created by the United States Congress by enactment of the Tennessee Valley Authority Act of 1933, U.S.C., Title 16, Section 831, et seq. Defendant Tennessee Valley Authority has its principal place of business in Mussel Shoals, Alabama.

9. Defendant Aubrey J. Wagner is Chairman of the Board of Directors of Tennessee Valley Authority and is vested with the authority over the operations of Tennessee Valley Authority.

10. Defendant Lynn Seeber is the Manager for Tennessee Valley Authority and is vested with the authority over the operations of Tennessee Valley Authority.

11. Defendant J. L. McPherson is the Superintendent of the Shawnee Power Plant of Tennessee Valley Authority, which facility is located in McCracken County, Kentucky. Defendant J. L. McPherson is vested with the overall responsibility for the day-to-day operations of the Shawnee Power Plant.

12. Defendant T. E. Cavaniss is the Superintendent of the Paradise Power Plant of Tennessee Valley Authority, which facility is located in Muhlenberg County, Kentucky. Defendant T. E. Cavaniss is vested with the overall responsibility for the day-to-day operations of the Paradise Power Plant.

13. Defendant Major General W. R. Desbory is the Commanding General of the United States Army Armor Center and Fort Knox. Defendant W. R. Desbory is vested with the authority over the operations of this United States Army military reservation which lies within Hardin, Meade, Jefferson, Nelson, and Larue Counties, Kentucky.

14. Defendant Colonel Ernest A. Vuley, Jr., is the Commanding Officer of the Lexington-Bluegrass Army Depot. Defendant Ernest A. Vuley, Jr., is vested with the authority over the operations of this United States Army military reservation which lies within Fayette and Madison Counties, Kentucky.

15. Defendant Major General John Cushman is the Commanding General of the 101st. Airborne Division (Airmobile) and Fort Campbell. Defendant John Cushman is vested with the authority over the operations of this United States Army military reservation which lies within Christian County, Kentucky.

16. Defendant General Creighton Abrams who is the Chief of Staff of the United States Army and defendant Robert F. Froehlke who is the Secretary of the United States Army are vested with the athuority over the operations of the United States Army and

more specifically those operations enumerated in paragraphs numbered 13, 14, and 15, herein.

17. Defendant Department of the Army is a duly constituted executive agency of the United States Government and has the direct administrative and operational control over those defendants and military reservations enumerated in paragraphs numbered 13, 14, and 15, herein.

18. Defendant United States Atomic Energy Commission, hereinafter referred to as "AEC", was created by the United States Congress by enactment of the Atomic Energy Act of 1946, Title 42, Section 2031, et seq. Defendant Atomic Energy Commission has its principal place of business in the Commonwealth of Kentucky at the Paducah, Oak Ridge Operations, in Paducah, Kentucky.

19. Defendant James R. Schlesinger is chairman of the Board of Directors of Atomic Energy Commission and as the chief commissioner is vested with the authority for the operations of Atomic Energy Commission.

20. Defendant Robert E. Hollingsworth is General Manager of Atomic Energy Commission and as the administrative officer and executive officer is vested with operational authority for the operations of the various facilities of Atomic Energy Commission.

21. Defendant Union Carbide Corporation, a New York Corporation, registered with the Secretary of State for the Commonwealth of Kentucky to do business and is doing business in the Commonwealth

of Kentucky, along with Atomic Energy Commission, referred to in paragraph numbered 18, herein, operates the Paducah Gas Diffusion Plant of the United States Atomic Energy Commission.

22. Defendant B. W. Stiller is the Manager of the Paducah Gaseous Diffusion Plant of the Atomic Energy Commission which is located in McCracken County, Kentucky. Defendant B. W. Stiller is vested with the overall responsibility of the day-to-day operations of the Paducah Gaseous Diffusion Plant of the Atomic Energy Commission.

23. Defendant Environmental Protection Agency, hereinafter referred to as "EPA", is a duly constituted agency of the United States of America, and was created pursuant to U.S.C., Title 42, Section 2321.

24. Defendant William D. Ruckelshaus is the Administrator of Environmental Protection Agency and is vested with the authority over the operations of Environmental Protection Agency.

25. Defendant Jack E. Ravan is the Administrator of Region IV of Environmental Protection Agency which includes the Commonwealth of Kentucky, and is vested with the authority over the operations of Environmental Protection Agency in Region IV.

26. In the event that any of the defendants named in paragraphs numbered 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, herein changes his official capacity so that he is no longer in the office or position described therein, plaintiff will request leave of this Court to amend this Complaint to show the

correct name of that person who succeeds to that office or position.

27. The authority of these defendants herein to carry out their civil functions is limited by laws, rules, and regulations; accordingly, the defendants herein must comply with these laws, rules and regulations with respect to the facilities and equipment in question. The individual defendants herein have been and continue to be responsible for their illegal and unauthorized actions herein alleged. Therefore, relief is sought against the defendants herein to enjoin said defendants from a continuation of their illegal and unauthorized actions in their official capacities and anyone acting in concert therewith:

GENERAL ALLEGATIONS

28. The following equipment emitting air contaminants is known to the plaintiff to be located and currently operating at:

(a) The Shawnee Power Plant of Tennessee Valley Authority:-

(1) Ten 1,347 Million BTU per hour coal-fired boilers.

(b) The Paradise Power Plant of Tennessee Valley Authority:-

(1) Two 6,018 Million BTU per hour coal-fired boilers.

(c) The United States Army Armor Center and Fort Knox:-

(1) Five oil burning indirect heat exchanges in the 0-10 Million BTU per hour input range;

(2) Two hundred seventy three coal-fired indirect heat exchangers in the 0-10,000 Million BTU per hour input range;

(3)Two trash incinerators in the 101-200 pounds per hour capacity range;

(4) Four hundred thirty six coal-fired stoves of less than 50,000 BTU per hour each range;

(5) Stone crushing process operations for road building purposes.

(d) The 101st. Airborne (Airmobile) Division and Fort Campbell:-

(1) One pathological incinerator at post hospital with a rated capacity of approximately 700,000 BTU per hour input range;

(2) Two gas-fired boilers with total burner input of approximately 5,600 Million BTU per hour each;

(3) Two gas-fired boilers with approximately 6,300 Million BTU per hour input each;

(4) Five combination gas and coal-fired indirect heat exchangers with approximately 20 Million BTU per hour input range each;

(5) Three combination gas and oil-fired boilers with approximately 50 Million BTU per hour input range each;

(6) One hand-coal-fired steam boiler with ap-

BEST COPY AVAILABLE

proximately 720 Million BTU per hour input range;

(7) Twenty five hand-coal-fired steam boilers with approximately 348 Million per hour input range each;

(8) Three natural gas-fired indirect heat exchangers having approximately 2,800 Million BTU per hour input range each;

(9) Six hand-coal-fired furnaces having 2,712 Million BTU per hour capacity each;

(10) One hand-coal-fired indirect heat exchanger having 576 Million BTU per hour capacity;

(11) Nine natural gas-fired indirect heat exchangers having approximately 6,040 Million BTU per hour capacity input each;

(12) Two natural gas-fired indirect heat exchangers having approximately 4,840 Million BTU per hour capacity each;

(13) Two combination gas-oil-fired indirect heat exchangers having approximately 11,250 Million BTU per hour capacity each.

(e) The Paducah Gaseous Diffusion Plant of the Atomic Energy Commission:-

(1) Three combination gas and fuel oil-fired indirect heat exchangers having a rated capacity of approximately 115 Million BTU per hour capacity each;

(2) Two liquidified petroleum gas incinerators

having rated capacity of approximately 450,000 BTU per hour each;

(3) One paper-burning incinerator with a rated capacity of approximately 10 bushels;

(4) Twenty five different point sources of emissions from the manufacturing process operations. Data as to emission outputs classified as restricted data in accordance with Atomic Energy Act of 1954.

(f) The Lexington-Bluegrass Army Depot:-

(1) Fifteen hand-coal-fired indirect heat exchangers having approximately 50,000 BTU per hour capacity each;

(2) One deactivation furnace for recovery of elemental metal from ammunition of unknown BTU per hour input;

(3) One central heating system of unknown BTU per hour capacity;

(4) Unknown number of gas-fired indirect heat exchangers of unknown BTU per hour capacity.

FIRST CLAIM

29. In furtherance of and to comply with the stated purpose of the Clean Air Act of 1970, U.S.C., Title 42, Section 1857, et seq., "to protect and enhance the quality of the nation's air resources," the plaintiff, Commonwealth of Kentucky, as required by Sections 107 and 110 of the Clean Air Act, and acting by and through its administrative agency, the Kentucky Air

Pollution Control Commission, promulgated and submitted to the defendant Ruckelshaus of EPA an implementation plan. This implementation plan, "Implementation Plan for the Attainment and Maintenance of the National and State Primary and Secondary Ambient Air Quality Standards for the Commonwealth of Kentucky", (hereinafter referred to as the "Kentucky Plan"), specifies the manner in which the state and national primary and secondary ambient air quality standards will be achieved and maintained within the Commonwealth of Kentucky. Attached to this Complaint as if fully set out herein at length is a copy of the Clean Air Act of 1970, as "Exhibit A". [Exhibit A omitted in herein Appendix]

30. Subsection (a) (2) (B) of Section 110 of the Clean Air Act of 1970 requires that the Kentucky Plan include "emission limitations, schedules, and time tables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard. . . ." Section 5 of Kentucky Air Pollution Control Commission Administrative Regulation AP-1, which sets out the permit requirement and procedures used to monitor orderly compliance with the Federal and Kentucky Air Laws, was specifically promulgated as part of Chapter 7 of the Kentucky Plan so that the schedules, timetables, and attainment measures of Subsection (a) (2) (B) could be met. Attached to this Complaint and made a part hereof as if copied at length herein is a copy of the Administrative Regulations of

the Kentucky Air Pollution Control Commission, as "Exhibit B". [Exhibit B omitted in herein Appendix]

31. The Kentucky Plan was approved by defendant Ruckelshaus, and the approval was published in the Federal Register, Volume 37, Number 105, pp. 10868 and 10869, and, thereby, the Plan became operative under both Federal and Kentucky law. Kentucky's Plan became Federal law pursuant to Sections 110, 113, and 118 of the Clean Air Act of 1970, and Kentucky law pursuant to Kentucky Revised Statutes 224.310, et seq., and Kentucky Revised Statutes, Chapter 13. Attached to this Complaint as if fully set out herein at length herein is a copy of the Federal Register, Volume 37, Number 105, as "Exhibit C". [Exhibit C omitted in herein Appendix]

32. Section 118 of the Clean Air Act of 1970 requires that "federal facilities" comply with the approved Kentucky Plan and states:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

33. Further, Executive Order No. 11507 promul-

gated by President Nixon on February 4, 1970, provides in Section 4 that:

> "Heads of agencies shall ensure that all facilities under their jurisdiction are designed, operated and maintained so as to meet the following requirement:
>
> (1) Facilities shall conform to air and water quality standards as defined in Section 2(d) of this order. . . ."

Section 2(b) defines agencies as being, *"departments, agencies* and *establishments* of the executive branch." Section 2(d) defines air and water quality standards as their respective quality standards and *"related plans of implementation*. . . adopted pursuant to the Clean Air Act . . . and Federal Water Pollution Control Act. . .". (Emphasis Ours).

34. The above-equipment described in paragraph numbered 28 (a)-(f), and incorporated herein by reference, is air pollutant emitting equipment. Section 5 of Kentucky Air Pollution Control Commission Administrative Regulation, AP-1, which is set forth in Chapter 7 of the Kentucky Plan, as promulgated pursuant to Section 110 and 118 of the Clean Air Act of 1970, requires that the owner and operator of such air pollutant emitting equipment apply for and obtain from the Kentucky Air Pollution Control Commission, a permit to operate their air contaminant equipment. The defendants, Tennessee Valley Authority, Seeber, Wagner, McPherson, Cavaniss, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of

the Army, Schlesinger, Hollingsworth, Stiller, and Atomic Energy Commission, in their official capacities as either officers or agencies of the United States Government, and Union Carbide Corporation have wrongfully and unlawfully refused, and continue to do so, ed to do so by agents, servants, and/or employees of defendant's respective equipment as set forth in paragraph numbered 28 (a)-(f) after having been requested to do so by agents, servants, and/or employees of the Commonwealth of Kentucky. Attached hereto and incorporated herein by reference as "Exhibit D" [Included in herein Appendix] are copies of request letters to the defendants and their refusals.

35. Furthermore, plaintiff has reasonable grounds to believe that at the United States Army Armor Center and Fort Knox, Lexington-Bluegrass Army Depot, and Fort Campbell, there exists other articles, machines, pieces of equipment or other contrivances for which operating permits are required by Chapter 7 of the Kentucky Plan.

36. Additionally, plaintiff, based upon information received, states that equipment now being operated at the Shawnee and Paradise Power Plants of Tennessee Valley Authority, the Paducah Gaseous Diffusion Plan. of Atomic Energy Commission, and the United States Army Military Reservations as set forth in paragraph numbered 28 (a)-(f), and incorporated heren, is in violation of the emission limitations of the Kentucky Plan. Plaintiff has reasonable grounds to believe and states that the Shawnee Power Plant of Tennessee Valley Authority is emitting particulate

matter at a rate of approximately 2.3 times the allowable emission limits, and is emitting sulfur dioxide at a rate of approximately 2.5 tmes the allowable emission limits, based on engineering calculations using best data available to plaintiff:

	Allowable	Actual
Particulate	1481.7 lbs/hr	3396 lbs/hr
Sulfur Dioxide	26940 lbs/hr	68295 lbs/hr

Plaintiff has reasonable grounds to believe and states that the Paradise Power Plant of Tennessee Valley Authority is emitting sulfur dioxide at a rate of approximately 3.85 times the allowable emission limits, based on engineering calculations using best data available to plaintiff:

	Allowable	Actual
Sulfur Dioxide	24072 lbs/hr	92465.6 lbs/hr

37. Plaintiff states that unless the defendants are enjoined and restrained from continuation of their unlawful acts as set forth in paragraph numbered 34, 35, and 36, herein, the defendants will continue to so violate Sections 108 and 110 of the Clean Air Act of 1970. Plaintiff has no other adequate remedy at law and has neither applied for nor been refused on the facts herein stated by any Court of the United States of America a restraining order, temporary injunction, or permanent injunction. The plaintiff and its class of citizens, if the defendants are permitted to continue their unlawful acts, will be permanently denied the right to the use of clean air in the atmosphere, their health and welfare will be endangered, and the

environs of the Commonwealth of Kentucky will be permanently damaged.

SECOND CLAIM

38. Section 110 of the Clean Air Act of 1970 required the Commonwealth of Kentucky to promulgate and adopt an implementation plan to meet and attain the national primary and secondary air quality standards. See paragraph 29 and 30, supra, which are incorporated herein by reference. When the Kentucky Plan was approved by the defendant Ruckelshaus, pursuant to Section 110 of the Clean Air Act, (See paragraph 31, supra, which is incorporated herein by reference), the obligation of its enforcement rested, not only upon the Commonwealth of Kentucky, pursuant to Section 101(3), but also on the Federal Government, through the Administrator, (the defendant Ruckelshaus), of Environmental Protection Agency, pursuant to Section 113 of the Clean Air Act.

39. In particular, Section 113 of the Clean Air Act of 1970 provides that "whenever, on the basis of any information available to him, the Administrator finds that *any person is in violation of any requirement of an applicable implementation plan* . . . or that *violations of an applicable implementation plan are so widespread* that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively. . . ," (Emphasis Ours), the Administrator of Environmental Protection Agency is empowered to commence appropriate actions toward obtaining compliance with the Plan.

40. The unlawful refusals of the defendants Seeber, Wagner, McPherson, Cavaniss, Union Carbide Corporation, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, and Atomic Energy Commission, to apply for and obtain a permit to operate from the Kentucky Air Pollution Control Commission for the equipment they each respectively are operating as set forth in paragraphs 28 (a)-(f) and 34, and incorporated herein by reference; the failure of these defendants to submit appropriate time schedules for compliance; and their violations of the emission limitations for each defendant's equipment, as set forth in paragraphs 28(a)-(f), 35, and 36, and incorporated herein by reference, have resulted not only in "mere" violations, but in "widespread" violations of the Kentucky Plan, because of the inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations.

41. Defendants Ruckelshaus, Ravan and Environmental Protection Agency, with information of the violations and widespread violations of the Kentucky Plan and of the inability of the Commonwealth of Kentucky to effectively enforce the Plan, have not commenced any actions toward obtaining compliance by the defendants as set out in paragraph numbered 39 herein with the provisions of the Kentucky Plan as required by Section 113 of the Clean Air Act of 1970.

42. The failure of the defendants Ruckelshaus, Ravan and Environmental Protection Agency to com-

mence appropriate actions against the defendants, Seeber, Wagner, McPherson, Cavaniss, Union Carbide Corporation, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, and Atomic Energy Commission, to compel compliance with the Kentucky Plan as to permits to operate, time schedules, and emission limitations, is so arbitrary, capricious, unlawful, and unwarranted as to deprive the citizens of the plaintiff state, due process and equal protection of the law as granted to the citizens of the Commonwealth of Kentucky, by the Fifth, Ninth, and Fourteenth Amendment to the Constitution of the United States of America.

43. The plaintiff further states that the actions of defendants Ruckelshaus, Ravan and Environmental Protection Agency, as set forth in paragraph numbered 41 and incorporated herein by reference, unless jointly and severally ordered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by defendants set forth in paragraph numbered 40 and incorporated herein by reference, will permanently deprive the plaintiff, its citizens, cities, counties, political subdivisions and agencies of the Commonwealth of Kentucky, of their right to the use of clean air in the atmosphere of the Commonwealth of Kentucky, and permanently damage the environs of the Commonwealth of Kentucky, and will allow conditions to be created which are dangerous to the health and welfare of the citizens of the Commonwealth of Kentucky.

44. Plaintiff states that the failure of defendants Environmental Protection Agency, Ruckelshaus, and Ravan to commence actions for compliance against the defendants set forth in paragraph numbered 40 and incorporated herein by reference is manifestly exemplified by the October 17, 1972, directive of defendant Ravan, which recommended that Federal facilities in Region IV should not apply for permits from any state. Attached as "Exhibit E" [Included in herein Appendix] and incorporated herein by reference as if fully copied herein is the Ravan letter of October 17, 1972.

THIRD CLAIM

45. Plaintiff states that defendants Seeber, Wagner, McPherson. Cavaniss, Tennessee Valley Authority, Desbory, Vuley. Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation on divers occasions have been requested by agents, servants, and/or employees of the Commonwealth of Kentucky to submit an application for and to obtain a permit to operate an air contaminant source and failed to submit the compliance schedules for attainment if the emission limitations as required by Chapter 7 of the Kentucky Plan adopted pursuant to the Clean Air Act of 1970.

46. Plaintiff states that the defendants as set forth in paragraphs numbered 34 and 45 and incorporated herein by reference have refused to submit applications for a permit to operate an air contaminant source on the basis of the policies of their respective agencies that Federal agencies do not have to comply with the permit requirements of a state plan as well as those of Kentucky's Plan, which is now applicable Federal law. Plaintiff states that there is existing a dispute between plaintiff and these dedendants as to the defendants' complying with the permit requirements of the Kentucky Plan and this Court should determine rights and obligations of the parties hereto.

47. Plaintiff states that defendants Environmental Protection Agency, Ruckelshaus and Ravan have failed to commence appropriate action against the defendants set forth in paragraphs numbered 39, 40, 41, 42, and 45, and incorporated herein by reference, toward obtaining compliance with the Kentucky Plan as required by Section 113 of the Clean Air Act of 1970. This Court should determine whether these defendants should assist the plaintiff in obtaining compliance with the permit system as set forth in Chapter 7 of Kentucky's Plan, which has been made Federal law. Plaintiff requests the review of this agency action or lack thereof, and that this action is being unlawfully withheld and/or unreasonably delayed, pursuant to U.S.C., Title 5, Section 702, et seq.

FOURTH CLAIM

48. Plaintiff states that the policy of Tennessee Valley Authority, Atomic Energy Commission, Environmental Protection Agency, and the Department of the Army, as set forth in paragraph numbered 3 through 47 and incorporated herein by reference that

Federal agencies do not have to comply with the permit requirements of Kentucky's Plan promulgated pursuant to U.S.C., Title 42, Section 1857, et seq., is arbitrary, capricious, abuse of discretion, not in accordance with law, and contrary to the constitutional rights of plaintiff and to its citizens. Therefore, this policy should be declared unlawful and set aside.

FIFTH CLAIM

49. Plaintiff states that Section 5 of the Administrative Regulation AP-1 of Kentucky Air Pollution Control Commission promulgated pursuant to Kentucky Revised Statutes 224.360 and Kentucky Revised Statutes 224.430 requires that any person who uses, operates or maintains an air contaminant source resulting in the presence of air contaminants in the atmosphere of the Commonwealth of Kentucky must first obtain a permit to operate. A copy of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission being heretofore incorparated in this Complaint as plaintiff's "Exhibit B". [Exhibit B omitted in herein Appendix]

50. Plaintiff states that the defendants, Seeber, Wagner, McPherson, Cavaniss, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation, use, operate and maintain air contaminant equipment in the Commonwealth of Kentucky, that Section 5 of Administrative Regulation AP-5 of the Kentucky Air Pollution Control Commission

requires the users, operators, maintainers of such equipment to obtain a permit to operate. These defendants each operate their respective equipment as set forth in paragraphs 28(a)-(f) and 29 incorporated herein by reference and refuse to obtain a permit to operate after having been requested to do so by agents, servants, and/or employees of the Commonwealth of Kentucky. These defendants have so refused to apply for a permit in either official capacity or agency of the United States Government, and Union Carbide Corporation as the contractor-operator of the Paducah Gaseous Diffusion Plant of the Atomic Energy Commission. See paragraph numbered 34 which is incorporated herein the same as if fully set forth herein.

51. Section 101 (a) (3) of the Clean Air Act of 1970 provides that the prevention and control of air pollution at its source is the primary responsibility of states and local governments. Section 118 of the Clean Air Act of 1970 provides that "each" department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property of facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. Section 116 of the Clean Air Act of 1970 provides that except in the area of state regulations on moving sources, (motor vehicles), "nothing in this act shall preclude or deny the right of any state or political subdivision thereof to adopt

or enforce . . . (2) any requirement respecting control or abatement of air pollution".

52. Plaintiff states that the permit requirement under Kentucky laws, Kentucky Revised Statutes 224.-360. Kentucky Revised Statutes 224.430, and Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission, is the major portion of the abatement and control program for air pollution by the Commonwealth of Kentucky. When a person submits an application to operate an air contaminant source they must set forth the specific nature of their operations, the types of air pollutants emitted, the point source for each of the emissions and the control equipment presently installed or to be installed. The engineering staff of the Kentucky Air Pollution Control Commission by reviewing these plans and specifications are able to calculate and determine whether or not that particular air contaminant source is complying with the air quality standards. This review can prevent the operation of the equipment which allows air contaminants to be emitted in excess of that allowed by applicable regulation, as well as provides for the making of the necessary changes by the air contaminant sources so that the air quality standards will not be violated.

53. Plaintiff states that as a result of the United States Congress enacting Section 101, Section 116, and Section 118 of the Clean Air Act of 1970, there was an affirmative waiver of the sovereign immunity of the United States of America and, therefore, provided that Federal agencies and their officials must

comply with the state abatement and control programs, and provides that the states bring the necessary litigation for compliance. This Court should issue an order directing the defendants Seeber, Wagner, McPherson, Cavaniss, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation comply with the permit requirements of Kentucky's abatement and control program.

WHEREFORE, plaintiff prays as follows:

1. On plaintiff's First Claim, (paragraphs numbered 29 through 37 herein), that the defendants, Seeber, Wagner, McPherson, Cavaniss, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation be jointly and severally:—

(A). Ordered to apply for and to obtain permits from the Kentucky Air Pollution Control Commission, pursuant to Section 5 of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission as promulgated in Chapter 7 of the Kentucky Plan pursuant to Section 107 and Section 110 of the Clean Air Act of 1970;

(B). Permanently restrained from refusing to comply with the provisions of Section 118 of the Clean Air Act of 1970.

2. On plaintiff's Second Claim, (paragraphs

numbered 38 through 44 herein), that the defendants Ravan, Ruckelshaus and the Environmental Protection Agency be jointly and severally: —

(A). Ordered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by the defendants set forth in paragraph numbered 1 of this prayer with the Kentucky Plan, specifically Section 5 of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission, which is contained in Chapter 7 of the Kentucky Plan.

3. On plaintiff's Third Claim, (paragraphs numbered 45 through 47 herein), have a judgment and decree of this Court declaring plaintiff's rights and status, and more particularly adjudicating: —

(A). That the defendants set forth in paragraph numbered 1 of this prayer, jointly and severally, do not have the right, authority, or power to refuse to comply with the permit requirements of the Kentucky Plan;

(B). That the defendants Ravan, Ruckelshaus, and the Environmental Protection Agency do not have the right, authority, or power when there are knowingly widespread violations of the Kentucky Plan to fail to initiate appropriate action pursuant to Section 113 of the Clean Air Act of 1970.

4. On plaintiff's Fourth Claim, (paragraph numbered 48 herein): —

(A). That the policy of Tennessee Valley Au-

thority, Atomic Energy Commission, and the Department of the Army stating that Federal agencies and facilities in Kentucky do not have to fully comply with the Kentucky Plan be held unlawful and set aside.

5. On plaintiff's Fifth Claim, (paragraphs numbered 49 through 53 herein), that the defendants set forth in paragraph numbered 1 of this prayer be jointly and severally: —

(A). Ordered to apply for and obtain permits from the Kentucky Air Pollution Control Commission, as required by Kentucky Revised Statutes 224.-360, Kentucky Revised Statutes 224.430, and Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission.

(B). Permanently restrained from refusing to comply with the abatement and control program of the Kentucky Air Pollution Control Commission, an administrative agency of the Commonwealth of Kentucky, as required by the Clean Air Act of 1970.

6. That defendants pay the costs herein expended and

7. For any and all other proper orders and relief to which plaintiff may be entitled.

Respectfully Submitted,

/s/ Ed W. Hancock
ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF
KENTUCKY
Capitol Building
Frankfort, Kentucky 40601
(Telephone: (502) 564-4513)

/s/ Kenneth A. Howe Jr.
KENNETH A. HOWE JR.
ASSISTANT ATTORNEY
GENERAL
COMMONWEALTH OF
KENTUCKY

/s/ Paul A. Lynch
PAUL A. LYNCH,
ASSISTANT ATTORNEY
GENERAL
COMMONWEALTH OF
KENTUCKY
309 Shelby Street, Room 111
Frankfort, Kentucky 40601
(Telephone: (502) 564-3595)
COUNSEL FOR PLAINTIFF
COMMONWEALTH OF
KENTUCKY

* * *

[Exhibit A Omitted in Printing]

* * *

[Exhibit B Omitted in Printing]

* * *

[Exhibit C Omitted in Printing]

"EXHIBIT D"

Request Letters To Defendants.

UNION CARBIDE CORPORATION
P.O. Box Y
Oak Ridge, Tennessee 37830

Law Department
Oak Ridge Office

July 29, 1971

Mr. John W. Sullivan, Chief
Engineering Section
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Re: Permit Application for Air Contaminant Source Paducah Gaseous Diffusion Plant

Dear Mr. Sullivan:

Your letter of July 2, 1971, directed to Union Carbide offices in Paducah, Kentucky, has been forwarded to us for reply. The letter noted that you had not then received the captioned permit application, requested

in your previous letter of June 15, and forwarded an additional set of application forms.

As I advised you in our telephone conversation some time ago, all facilities at the Paducah Gaseous Diffusions Plant are owned by the United States Government, acting by and through the Atomic Energy Commission, and operated by Union Carbide acting under its prime contract with the AEC. Any action such as the application for a permit from a state regulatory agency must, therefore, be taken by the AEC, under the requirements of Federal statutes and regulations as well as the contractual provisions under which Union Carbide operates these facilities.

Your original and subsequent communications were promptly delivered by us to the proper AEC officials at Paducah, and we would suggest that your future communications regarding this and related matters should be directed to such officials. The cognizant AEC official is: Mr. B. N. Stiller, Area Manager, Paducah Office, Oak Ridge Operations, U. S. Atomic Energy Commission, P. O. Box 1150, Paducah, Kentucky 42001.

We trust the foregoing information will simplify your handling of matters relative to the Paducah Gaseous Diffusion Plant. If we can be of further service, please advise.

Sincerely,

/s/ Edgar R. Bowers
Edgar R. Bowers

ERB:awh

UNITED STATES
ATOMIC ENERGY COMMISSION

IN Reply Refer To:
M:EWN

Paducah, Kentucky 42001
July 23, 1971

Kentucky Air Pollution Control Commission
ATTN: Mr. J. W. Sullivan
275 East Main Street
Frankfort, Kentucky 40601

Subject: AIR POLLUTION CONTROL COMMISSION — INVENTORY

Gentlemen:

Your Permit Application, Form APC-110, forwarded to our operating contractor, Union Carbide Corporation, Nuclear Division, relative to the Government-owned gaseous diffusion plant near Paducah, Kentucky, was referred to this office for reply.

While we do not consider the Kentucky requirements to be directly applicable to the operation of the Federally-owned facility for atomic energy purposes, we share with the State a deep interest in preventing and abating both air and water pollution problems and are happy to cooperate as a matter of comity with the Kentucky Air Pollution Control Commission. We there-

fore directed our operating contractor to complete the form providing the information sought, and we are submitting this information to you. With this transmittal, we are demonstrating our willingness to cooperate with the State within the framework of Executive Order No. 11507 which provides the policy of the Federal Government to work with State and local bodies in matters of air and water pollution control.

If you have any questions regarding the data submitted, please advise. My telephone number is Area Code 502,444-6311, extension 227, or FTS 502-444-6227.

Sincerely,

/s/ B. N. Stiller
Manager
Paducah Area

Enclosure:
Form APC-100w/atts.

June 29, 1972

Mr. Robert L. Eaton
Administrative Assistant
A G Office
Headquarters US Army Armor Center and
Fort Knox
Fort Knox, Kentucky 40121

Dear Mr. Eaton:

Regarding the Army's air pollution control program at Fort Knox referred to in your letter of June 9, 1972, we would like to know about the air contaminant sources and the degree that they will be controlled. The anticipated schedule for completion of the various abatement projects you mentioned is also desired.

The reason for requesting this information is that the Federal Government requires that the Kentucky Air Pollution Control Commission achieve control of emissions from air contaminant sources in the State within a specific time schedule.

If you have any questions or wish an informal meeting to discuss this matter, please contact me.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM:ce

DEPARTMENT OF THE ARMY
HEADQUARTERS US ARMY ARMOR CENTER
AND FORT KNOX
FORT KNOX, KENTUCKY 40121

AHBADFAE 9 JUN 1972

Mr. Samuel M. Murphy, Engineering Program
Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Murphy:

Reference is made to your letter of May 26, 1972, concerning pollution control permits for any contaminating facilities located at Fort Knox.

Department of the Army policies prohibit installation commanders from making application for State or local permits relating to air emissions, waste water discharges or the construction and operation of facilities involving pollution. However, the Army does have a comprehensive pollution control program and all pollution abatement projects possible within funding and approved limitations are being accomplished at this installation.

Sincerely yours,
/s/ Robert L. Eaton
ROBERT L. EATON
Administrative Asst
AG Office

May 26, 1972
Commanding General, U.S.A.A.R.M.C.
Fort Knox, Kentucky 40121

Dear Sir:

I wish to call to your attention the Clean Air Act, December 1970, Section 118, "Control of Pollution From Federal Facilities." The first sentence of this section states—

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property of facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."
>
> (U.S. Government Printing Office: 1971 0-413-241, P. 27)

To inform you of the requirements in Kentucky, I enclose a copy of KAPCC Regulations AP-1 through AP-10 and a set of permit applications forms with instructions.

You will note in AP-1, Section 5 that it is a requirement of the Kentucky Air Pollution Control Commission that any one who constructs or operates an air contaminant source in the State must have a permit. The Commission's policy is to issue one permit

to cover all source emissions of a facility. Therefore all emission sources should be indicated on the application and include a description of the controls currently in use or proposed to achieve compliance with the regulations.

Commanding General, U.S.A.A.R.M.C.
Page Two
May 26, 1972

In order that a permit be issued it is necessary to include a time schedule showing when compliance will be accomplished for those sources not yet controlled.

Among the sources that should be included in the permit application are incinerators, indirect heat exchangers and any process operations such as stone crushing and hot mix asphalt plants.

In view of the above you are requested to submit an application with all pertinent data on or before August 26, 1972.

If you have any questions, feel free to contact this office.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM:ce
Enclosure

DEPARTMENT OF THE ARMY
HEADQUARTERS, LEXINGTON-BLUE GRASS
ARMY DEPOT
LEXINGTON, KENTUCKY 40507

25 JUL 1972

AMXLX-S

Mr. Samuel M. Murphy
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Murphy:

The following information is forwarded in response to your letter of 1 June 1972 requesting the depot to apply for a permit in compliance with KAPCC Regulations AP-1 through AP-10.

Staff and operating personnel at all levels of the depot have taken aggressive action to improve the environment and to control or eliminate problem areas that could be detrimental to the ecology. In June 1969, a depot-wide survey encompassing all operations was conducted to identify potential pollution problem areas. The areas are under continual surveillance to insure that approved procedures are followed.

The depot has invested considerable operating capital in modernizing operations, in procuring and installing new equipment, and in modifying and constructing new

facilities to combat actual and incipient pollution hazards. Some examples are: within the spirit of the Clean Air Act of December 1970 several coal burning facilities were converted to fuel oil operations; several quarters have had new natural gas heating systems installed; open-pit burning was discontinued as of October 1970, in coordination with state officials; refuse disposal is accomplished by operation of sanitary landfills. Further, a project to install air pollution control cyclone collectors in the central heating plant has been approved by higher headquarters and as funds are provided should be installed in the foreseeable future.

25 JUL 1972

Mr. Samuel M. Murphy
Kentucky Air Pollution Control Commission

Department of the Army policy prohibits installation commanders from applying for permits from state or local pollution regulatory authorities. Consequently, this depot must decline your request to submit the permit application forms. Although we are not allowed to submit these forms, please understand that this depot will cooperate in every possible way to control and to eliminate pollution hazards. In this regard, representatives from state and local environmental pollution control agencies may visit our facilities, may examine operating records and may conduct tests provided security restrictions are met and the visitors are accompanied by applicable representatives designated

by Headquarters, US Army Materiel Command, Washington, DC.

Sincerely yours,

/s/ E. S. Goepper
E. S. GOEPPER
COL, QMC
Commanding Officer

Copy furnished:
AMCIS-MD, Washington, DC

June 1, 1972

Col Edwin S. Goepper
Commanding Officer
Lexington Blue Grass Depot
Lexington, Kentucky 40507
Dear Col Goepper:

I wish to call to your attention the Clean Air Act, December 1970, Section 118, "Control of Pollution from Federal Facilities" The first sentence of this section states —

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to

the same extent that any person is subject to such requirements."

(U.S. Government Printing Office: 1971 0.413 241, P. 27)

To inform you of the requirements in Kentucky, I am enclosing a copy of KAPCC Regulations AP-1 through AP-10 and a set of permit application forms with instructions.

You will note in AP-1, Section 5 that it is a requirement of the Kentucky Air Pollution Control Commission that any one who constructs or operates an air contaminant source in the State must have a permit. The Commission's policy is to issue one permit to cover all source emissions of a facility. Therefore all emission sources should be indicated on the application and include a description of the controls currently in use or proposed to achieve compliance with the regulations.

In order that a permit be issued it is necessary to include a time schedule showing when compliance will be accomplished for those sources not yet controlled.

Col. Edwin S. Goepper
Page Two
June 1, 1972

Among the sources that should be included in the permit application are incinerators, indirect heat exchangers and any process operations, such as stone crushing and hot mix asphalt plants.

In view of the above you are requested to submit

an application with all pertinent data on or before August 31, 1972.

If you have any questions, feel free to contact this office.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM.ce
Enclosures

DEPARTMENT OF THE ARMY
HEADQUARTERS 101ST AIRBORNE DIVISION (AIRMOBILE) AND FORT CAMPBELL
FORT CAMPBELL, KENTUCKY 42223

AJCEN

15 August 1972
AUG 17 Rec'd

Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Attention: Mr. Samuel M. Murphy

Gentlemen:

Reference is made to your letter dated 1 June 1972 concerning the submittal of an application for a permit for operation of heating plants.

Although current Department of the Army regulations do not allow us to apply for such a permit we do wish to cooperate in every way possible with your office. Accordingly, enclosed is pertinent information on our heating plants which appear to be covered by your regulations. Please advise if any further information is desired.

Sincerely yours,

/s/ Robert Anderson
ROBERT ANDERSON
Acting Facilities Engineer

1 Incl

June 1, 1972

Commanding Officer, U.S. Army
Defense Military Function
Fort Campbell, Kentucky 42223

Dear Sir:

I wish to call to your attention the Clean Air Act, December 1970, Section 118, "Control of Pollution from Federal Facilities." The first sentence of this section states—

> "Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in

> the discharge of air poilutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."
>
> (U.S. Government Printing Office: 1971 0-413-241, P. 27)

To inform you of the requirements in Kentucky, I am enclosing a copy of KAPCC Regulations AP-1 through AP 10 and a set of permit application forms with instructions.

You will note in AP-1, Section 5 that it is a requirement of the Kentucky Air Pollution Control Commission that any one who constructs or operates an air contaminant source in the State must have a permit. The Commission's policy is to issue one permit to cover all source emissions of a facility. Therefore all emission sources should be indicated on the application and include a description of the controls currently in use or proposed to achieve compliance with the regulations.

In order that a permit be issued it is necessary to include a time schedule showing when compliance will be accomplished for those sources not yet controlled.

Among the sources that should be included in the permit application are incinerators, indirect heat ex-

changers and any process operations, such as stone crushing and hot mix asphalt plants.

In view of the above you are requested to submit an application with all pertinent data on or before August 31, 1972.

If you have any questions, feel free to contact this office.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM:ce
Enclosures

KENTUCKY
AIR POLLUTION CONTROL COMMISSION
275 EAST MAIN STREET
FRANKFORT, KENTUCKY 40601

F. E. Gartrell, Dr. P. H.
Research and Development
Tennessee Valley Authority
Chattanooga, Tennessee 37401

Dear Dr. Gartrell:

This is to acknowledge your letter of August 14, 1972, concerning TVA's policy regarding the securing of state air pollution control permits and compliance with applicable sulfur dioxide emission standards.

It is regrettable that TVA at this late date maintains an official policy of ignoring state legal environmental requirements in light of what is, in our view,

explicit language in the Clean Air Act (As Amended) and Executive Order 11507 issued by President Nixon on February 4, 1970. We are aware that Alabama's recent action to force TVA is comply with similar requirements in that state, and discussions are presently being held with our Attorney General's Office to determine whether or not Kentucky may follow a similar course.

Regarding your request for an extension of the regulatory deadline for submittal of an acceptable sulfur dioxide control strategy, on or before January 1, 1973, we will be in a better position to answer your request following a review of your proposed strategy as to its adequacy and enforceability. The Commission meets next on October 17, 1972, if possible, we will attempt to make this an Agenda item and reach a definite position at that time.

The question of liability for proper coal refuse disposal in compliance with Commission regulations, appears to be as you state with the Peabody Coal Company. However, this question is being referred to our attorneys for further review. If any diversion with your position is identified, that will be brought to your attention.

Sincerely yours,

/s/ Frank P. Partee
Frank P. Partee, Director
Kentucky Air Pollution Control
Commission

FPP:as
Enclosure

TENNESSEE VALLEY AUTHORITY
CHATTANOOGA, TENNESSEE 37401
August 14, 1972

Mr. Frank Partee, Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort,Kentucky 40601

Dear Mr. Partee:

With regard to the air contaminant source permit application forms that your staff sent us on July 13, 1972, it is our view that TVA, as a Federal agency, is not required to secure state permits in order to continue carrying out its operations and functions under the TVA Act, and it would accordingly not be appropriate for it to apply for permits. We are, however, anxious to cooperate with the State of Kentucky in the attainment of its declared air quality goals. We are therefore pleased to supply you with the same emission data and other information for TVA's Paradise and Shawnee power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations. For your convenience in utilizing the information we are supplying it on the APC permit forms even though, as indicated above, by using such forms we are not thereby applying for the issuance of permits. I shall be glad to answer any questions you may have concerning this position.

TVA is currently studying and evaluating possible

alternative control measures which we might apply at those TVA operations in Kentucky where emissions now exceed the emission standards contained in the Kentucky air pollution control regulations. We anticipate completing our plans and schedules for controlling particulate emissions by October 9, 1972. We will supply you with the copies thereof which we will be glad to discuss if you so desire.

On the other hand, meeting Kentucky's standards with respect to sulfur dioxide emissions presents a more difficult problem. As you know, proven technology is not available to provide effective sulfur dioxide controls for large power plants and supplies of low sulfur fuels are presently not available to TVA in adequate quantities. The Environmental Protection Agency has recognized this state of affairs in the May 31, 1972, *Federal Register*. Although TVA is in the process of locating sources of low sulfur coal and will continue to carry out its extensive research program on the removal of sulfur dioxide from stack gases, it will be unable to submit a meaningful emission control plan for sulfur dioxide by January 1, 1973. As a consequence, TVA intends to submit an alternate control strategy to meet Kentucky's ambient air quality standards for sulfur dioxide. Such an alternate control strategy will be submitted by a date which will allow a reasonable time for the Commission to review the strategy and make recommendations and for TVA to make any necessary modifications before January 1, 1973. Although the details of our strategy are not yet available, we are enclosing a plan of the proposed ambient air quality monitoring which will be used to

demonstrate that our strategy will achieve and maintain the applicable ambient air quality standards. Should the Commission be unable to approve TVA's strategy before January 1, we hereby respectfully request an extension of the January 1 deadline until such time as TVA is able to satisfy the Commission with an acceptable alternate control strategy. Please advise us promptly if such an extension would be granted, as this information is essential in order for us to determine whether we must seek an exception from the Kentucky Standards pursuant to the Federal Clean Air Act.

TVA owns the mineral rights to several coal mines in Kentucky; however, only the Camp Breckenridge property in Union County is presently being mined. Since this mining is conducted by the Peabody Coal Company pursuant to the terms of a standard type coal lease which provides for a royalty to TVA based on tonnage mined, it is our view that Peabody is responsible for reporting any coal refuse piles. Therefore, no coal refuse information is supplied herein.

If we can help in any way by providing additional information at this time on our operations in Kentucky, either in written form or in conferences with you or members of your staff, please let us know.

Sincerely yours,

/s/F. E. Gartrell
F. E. Gartrell, Dr. P. H.
Director of Environmental
Research and Development

Enclosures

"EXHIBIT E"

October 17, 1973, Directive from Jack E. Ravan, Administrator, Region IV, Environmental Protection Agency.

ROUTING AND TRANSMITTAL SLIP

1 TO (Name, office symbol or location)
MR. FRANK P. PARTEE

REMARKS

The attached letter has been set to Command Levels and Key Environmental Officials with the various Federal installations and agencies within this Region.

If you have any questions, please contact Mr. A. G. Linton as indicated in the letter.

/s/ Gene B. Welsh
Gene B. Welsh
Director

Air and Water Programs
Division

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions.

FROM (Name, office symbol or location)
EPA, Region IV, Atlanta, Georgia

DATE
10/30/72

PHONE
404-526-3043
OPTIONAL FORM 41 *GPO: 1972 O - 460-910

August 1967
GSA FPMR (41CFR) 100 - 11 206

ENVIRONMENTAL PROTECTION AGENCY
REGION IV
1421 Peachtree St., N.E., Atlanta, Georgia 30309

October 17, 1972

SUBJECT: Federal Agencies Compliance with Section 118 of Clean Air Act and Executive Order 11507

Dear Sir:

With reference to Section 118 of Clean Air Act, as amended, Section 21 of the Federal Water Pollution Control Act, as amended, and Executive Order 11507, Federal facilities have a responsibility to cooperate with EPA and state pollution control efforts and programs. The purpose of this letter is to advise you of these responsibilities and to recommend a course of action that will facilitate mutual Federal/State agreement on air and water pollution control compliance measures.

It is clear that Section 118 of the Clean Air Act requires Federal facilities to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans. As you are aware, there has been considerable discussion regarding appropriate procedural mechanisms for obtaining Federal agency commitments to install air pollution abatement equipment and to make progress reports demonstrating adherence to pertinent standards, emission limitations and compliance schedules. These discussions have also addressed the extent to which Section 118 requires Federal agencies to comply with state and local procedural requirements for reports, permits, registration, inspection and data.

Our advice on this matter, at this time, is to provide the data specifically requested by the states so they may make a determination as to: (1) the facilities compliance with the approved state air implementation plans and (2) the abatement action facilities must take in order to meet implementation plan requirements.

We recommend that each Federal facility under your jurisdiction which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compliance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and

the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records. Whenever a state makes a reasonable and specific request to review operating records, we recommend that your agency adopt an open-door policy by providing the requested data. We do not, however, encourage the submission of continuous reporting of routine operating data except on an "as needed" basis.

If a state uses a registration procedure to obtain discharge information, Federal facilities should file registration forms. However, we do not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit application that will lead automatically to issurance of a state permit or license. The registration and other needed data should voluntarily be provided to the states by your agency. Our aim is to encourage Federal agencies to provide the states with all the information required to assess compliance of pollution sources with standards, emission and discharge limitations and the needs for additional abatement measures.

With respect to reporting of waste water treatment operations, we would like to make the same distinction as described above in regard to data needed to determine if the facility is required to install additional abatement equipment or take other abatement measures as compared to routine operating data. If a state

or EPA has reasons to believe that a waste water treatment facility is not adequate to meet water quality standards or is not being operated effectively, a specific request for information will be made. The facility should then provide, for a designated period of time, operating or monitoring data needed to complete that particular study and develop recommendations for additional remedial action.

We hope this advice and guidance will be beneficial to Federal facilities and aid them to respond to the immediate requirements of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. If you should have any comments or questions regarding this subject matter, please contact Mr. Arthur G. Linton, Chief, Federal Activities Office, (telephone number 404-526-5253).

Sincerely yours,

/s/ Jack E. Ravan
Jack E. Ravan
Regional Administrator

Filed Jan. 18, 1973

[Title Omitted in Printing]

MOTION

1. Pursuant to the laws of the Commonwealth of Virginia, the Virginia Air Pollution Control Board, an agency of the Commonwealth, is charged with the duty of abating, controlling and prohibiting air pollution throughout the Commonwealth. In the execution of its duty, the Virginia Air Pollution Control Board has promulgated rules and regulations which, unlike those of the Commonwealth of Kentucky, require the issuance of a permit only for new sources of air pollutants, including modifications of existing sources.

2. Existing sources of emission of air pollutants of a certain magnitude were to be registered with the Virginia Air Pollution Control Board and thereafter, plans for the control of emissions in excess of allowable limitations were to be submitted to the Board for each such existing source.

3. At present, there are within the Commonwealth of Virginia numerous sources of air pollutants owned and operated by, or for the benefit of, the United States including, but not limited to, facilities of the Department of the Navy, the Department of the Army, the Department of the Air Force and the General Services Administration.

4. At this time, the United States is not believed to be engaged in any activity in the Commonwealth which would require the prior issuance of a permit by

the Virginia Air Pollution Control Board; however, the Commonwealth asserts a vital interest in the issues presented by this action and its participation herein as amicus curiae may be of assistance to the Court. Therefore, the Commonwealth moves the Court for leave to appear as amicus curiae and to make such arguments and tender such briefs as are appropriate.

COMMONWEALTH OF VIRGINIA

By /s/ Andrew P. Miller
Attorney General

/s/ C. Tabor Cronk
Assistant Attorney General

Andrew P. Miller
Attorney General

C. Tabor Cronk
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

Rendered — 2-5-73
Entered: 2-5-73

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

COMMONWEALTH OF KENTUCKY, Ex Rel.
Ed W. Hancock, Attorney General
of Kentucky
v.

Plaintiff,
CIVIL ACTION
NO. 7480-G

WILLIAM D. RUCKELSHAUS,
Administrator of the
Environmental Protection
Agency, et al.,

Defenants.

ORDER

Citing its interest in the issues before the Court in this case, the Commonwealth of Virginia has, by its Attorney General, moved the Court to exercise its discretion to permit the Commonwealth to appear herein as amicus curiae.

In consideration of the Commonwealth's motion, and deeming it proper to do so, it is hereby ordered that the Commonwealth be, and hereby is permitted to appear as amicus curiae and to make such arguments and tender such briefs as are appropriate.

Enter this Order this
5th day of February, 1973.

/s/ James F. Gordon
JUDGE

/s/ Barbara D. Spain

Filed March 5. 1973

[Title Omitted in Printing]

**MOTION TO DISMISS OR
IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT**

Defendants Tennessee Valley Authority, Aubrey J. Wagner, Lynn Seeber, J. L. McPherson, and T. E. Cavaniss move the Court to dismiss the action as to them on the grounds that (1) the complaint fails to state a claim against said defendants upon which relief can be granted, (2) the action cannot be maintained by the State Attorney General without the request and consent of the Kentucky Air Pollution Control Commission, and (3) the action cannot be maintained as a class action.

In the alternative, said defendants move for summary judgment in their favor on the ground that the pleadings, together with the affidavit of Lynn Seeber, hereto annexed as Exhibit 1, show that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

Said defendants request that this motion be set for oral hearing at a time convenient to the Court.

Respectfully submitted,

/s/ Robert H. Marquis
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee

/s/ Herbert S. Sanger, Jr.
Associate General Counsel
Beauchamp E. Brogan
Assistant General Counsel

/s/ Justin M. Schwamm
Attorneys for Defendants Tennessee Valley Authority, Aubrey J. Wagner, Lynn Seeber, J. L. McPherson, and J. T. Cavaniss

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

EXHIBIT 1

AFFIDAVIT OF LYNN SEEBER

STATE OF TENNESSEE }
} SS
COUNTY OF KNOX }

Lynn Seeber, being first duly sworn, deposes and says:

I am the General Manager of the Tennessee Valley Authority (TVA) and I have occupied that position since March 1, 1970. I was graduated from the University of Tennessee with a B.S. degree in industrial management in 1949, and a J.D. degree in 1951. While in Law School at the University, I was Editor-in-Chief of the Tennessee Law Review and a member of the Order of the Coif. I am licensed to

practice law in the State of Tennessee. I was employed by TVA as an attorney in the Division of Law from 1952 until 1967, when I was appointed Director of the Division of Reservoir Properties. Later in 1967 I returned to the Division of Law as Solicitor. In 1969 I was appointed Assistant General Manager and served in that capacity until March 1, 1970, when I was appointed General Manager.

As General Manager I am the principal TVA administrative officer and I have responsibility for the coordination and execution of programs, policies and decisions adopted or approved by the TVA Board of Directors. I review proposed TVA actions having major policy implications. I have personal knowledge of the matters herein set forth.

In August and October 1972, TVA transmitted to the State of Kentucky information concerning its Paradise and Shawnee Steam Plants in Kentucky, the emissions therefrom, and plans and schedules for reducing and controlling such emissions. The information was supplied on the permit forms provided by the State, but in the letters transmitting the forms it was made clear that TVA did not consider itself bound to secure permits, and that TVA was not thereby applying for the issuance of permits. Copies of the letters of transmittal are attached hereto as Exhibits A and B.

By letter dated November 10, 1972, the Commission wrote me acknowledging the fact that it had received the required emission data and other related

information concerning TVA's Paradise and Shawnee Plants. This letter requested a formal statement of TVA's position on the permit question by December 8, 1972, for consideration by the Commission at its December meeting of what further steps it might desire to take. A copy of this letter is attached hereto as Exhibit C.

On November 29, 1972, after this action was filed, the Commission wrote me again stating that the Attorney General had filed the action, and that such filing was independent of the Commission. The Commission expressed regret for such action having been taken before I had a chance to reply to its November 10, 1972, inquiry. A copy of the November 29 letter is attached hereto as Exhibit D.

Further information on TVA's emission control plans and schedules was submitted to the State on January 19, 1973. A copy of the transmittal letter is attached as Exhibit E.

TVA received a letter dated October 17, 1972, from the Environmental Protection Agency (EPA), the text of which is identical to the one which the Kentucky Air Pollution Control Commission received from EPA and which is attached as Exhibit E to plaintiff's complaint. A copy of the letter referred to is attached hereto as Exhibit F. This letter sets forth EPA's interpretation of certain requirements of section 118 of the Clean Air Act and Executive Order 11507, including their application to state permit requirements, as they affect federal agencies. Thereafter TVA re-

ceived a memorandum dated January 26, 1973, from William D. Ruckelshaus, Administrator of EPA, in which he affirmed the view taken in the October 17, 1972, letter, stating, in pertinent part:

> It is EPA's view, expressed last year, that Federal facilities are not required to apply for State operating permits.

A copy of the January 26, 1973, memorandum in hereto attached as Exhibit G. The procedure outlined by EPA in Exhibits F and G, with the exception of signing the permit forms as recommended in Exhibit G, has been followed by TVA in its dealings with the State of Kentucky concerning TVA's obligations under section 118 of the Clean Air Act. The Commission has not at any time informed TVA that the information submitted by TVA is unsatisfactory or in any way insufficient to permit the Commission to assess TVA's emissions or its control strategies and compliance schedules. The State of Kentucky has never informed TVA that it desires verification of the data submitted to it by TVA. TVA will supply such verification if the State of Kentucky deems it necessary.

/s/ Lynn Seeber
Lynn Seeber

[Jurat Omitted in Printing]

Exhibit A

August 14, 1972

Mr. Frank Partee, Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

With regard to the air contaminant source permit application forms that your staff sent us on July 13, 1972, it is our view that TVA, as a Federal agency, is not required to secure state permits in order to continue carrying out its operations and functions under the TVA Act, and it would accordingly not be appropriate for it to apply for permits. We are, however, anxious to cooperate with the State of Kentucky in the attainment of its declared air quality goals. We are therefore pleased to supply you with the same emission data and other information for TVA's Paradise and Shawnee power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations. For your convenience in utilizing the information we are supplying it on the APC permit forms even though, as indicated above, by using such forms we are not thereby applying for the issuance of permits. I shall be glad to answer any questions you may have concerning this position.

TVA is currently studying and evaluating possible alternative control measures which we might apply at

those TVA operations in Kentucky where emissions now exceed the emission standards contained in the Kentucky air pollution control regulations. We anticipate completing our plans and schedules for controlling particulate emissions by October 9, 1972. We will supply you with the copies thereof which we will be glad to discuss if you so desire.

On the other hand, meeting Kentucky's standards with respect to sulfur dioxide emissions presents a more difficult problem. As you know, proven technology is not available to provide effective sulfur dioxide controls for large power plants and supplies of low sulfur fuels are presently not available to TVA in adequate quantities. The Environmental Protection Agency has recognized this state of affairs in the May 31, 1972, *Federal Register*. Although TVA is in the process of locating sources of low sulfur coal and will continue to carry out its extensive research program on the removal of sulfur dioxide from stack gases, it will be unable to submit a meaningful emission control plan for sulfur dioxide by January 1, 1973. As a consequence, TVA intends to submit an alternate control strategy to meet Kentucky's ambient air quality standards for sulfur dioxide. Such an alternate control strategy will be submitted by a date which will allow a reasonable time for the Commission to review the strategy and make recommendations and for TVA to make any necessary modifications before January 1, 1973. Although the details of our strategy are not yet available, we are enclosing a plan of the proposed ambient air quality monitoring which will be used to

demonstrate that our strategy will achieve and maintain the applicable ambient air quality standards. Should the Commission be unable to approve TVA's strategy before January 1, we hereby respectfully request an extension of the January 1 deadline until such time as TVA is able to satisfy the Commission with an acceptable alternate control strategy. Please advise us promptly if such an extension would be granted, as this information is essential in order for us to determine whether we must seek an exception from the Kentucky Standards pursuant to the Federal Clean Air Act.

TVA owns the mineral rights to several coal mines in Kentucky; however, only the Camp Breckenridge property in Union County is presently being used. Since this mining is conducted by the Peabody Coal Company pursuant to the terms of a standard type coal lease which provides for a royalty to TVA based on tonnage mined, it is our view that Peabody is responsible for reporting any coal refuse piles. Therefore, no coal refuse information is supplied herein.

If we can help in any way by providing additional information at this time on our operations in Kentucky, either written form or in conferences with you or members of your staff, please let us know.

Sincerely yours,

/s/ F. E. Gartrell, Dr. P.H.
Director of Environmental
Research and Development

Enclosures

Exhibit B

October 13, 1972

Mr. Frank P. Partee, Technical Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

As provided for in AP-1, section 11(2), Kentucky Air Pollution Control Commission Regulations, we are sending you TVA's control plan and schedule for achieving compliance with particulate emission standards at TVA's Paradise and Shawnee Steam Plants.

In reference to your letter of August 31, 1972, we also regret that TVA and the Air Pollution Control Commission do not agree on whether TVA, as a federal agency, is obligated to obtain state permits. However, we sincerely hope that the disagreement of our two agencies on this legal issue will not stand in the way of our continued cooperation to achieve the air quality goals of the Commonwealth of Kentucky. For its part, TVA will continue to comply with the standards of Kentucky's Air Pollution Control Commission Regulations and to provide the Commission with all appropriate information. In regard to the permit question, you may be interested in examining a copy of the papers filed in the case of *People* v. *Stastny*, Civ. No. 72-112-WPC (C.D. Cal., July 17, 1972), being sent to you under separate cover.

If you have any questions concerning the control plan and schedule, please let me know.

Sincerely yours,

/s/ F. E. Gartrell, Dr. P. H.
Director of Environmental
Research and Development

Exhibit C

KENTUCKY
AIR POLLUTION CONTROL COMMISSION
275 East Main Street
FRANKFORT, KENTUCKY 40601
November 10, 1972

Mr. Lynn Seeber
General Manager
Tennessee Valley Authority
411 New Sprankle Building
Knoxville, Tennessee 37902

Dear Mr. Seeber:

On July 13, 1972, the Commission forwarded to Dr. Larry Montgomery, Air Quality Branch, TVA, Mussel Shoals, Alabama a standard form for a permit to operate an air contaminant source in Kentucky. (Shawnee Power Plant, Paradise Power Plant). On August 14, 1972, a response was received which gave the required emission data and other related information, but contained remarks stating TVA "is not required to secure

state permits" and is "not thereby applying for the issuance of permits."

Accordingly, at its October 17, 1972, meeting the Commission moved to do two things: (1) to appeal to your office as the highest identifiable federal authority directly responsible for the named facility's operation and solicit your cooperation, and (2) to request advice from Mr. William E. Ruckelshaus, Administrator, U.S. Environmental Protection as to his agency's intent on achieving compliance by federal facilities with applicable state air pollution regulations.

You are probably aware that Section 110 of the Clean Air Act (42 U.S.C. 1857 et seq) requires all states to develop an implementation plan to attain and maintain national goals for air quality. The plans are anchored in the premise of eliminating air pollution at its source through the imposition of discharge limits. Definite timeframes were imposed by Congress in the Act to complete source control programs. In Kentucky, the legal mechanism for accomplishing these actions is through the issuance of permits to construct and to operate air pollution sources, which permits embody the time schedule required to bring each sourc into compliance. Section 118 of the Clean Air Act states clearly that:

Mr. Lynn Seeber
Page Two
November 10, 1972

> "Each department, agency, and instrumentality of the executive, legislative and judicial branches of

> the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

Some questions seem to arise as to what was intended by the word "requirements." We maintain it relates not only to the substantive discharge limits, but to ordinary administrative requirements as well, including the application for and obtaining of a state permit to operate your facility

The Alabama Air Pollution Control Commission recently filed a complaint in the U.S. District Court, Alabama Northern District, to force compliance by federal facilities in that state with their permit requirements. The outcome of that action will undoubtedly clarify what federal facilities must do to comply with all State Implementation Plans. Before our Commission would join in such precipitious action, we would hope that all agencies such as yours would cooperate in a spirit of federal leadership as directed by President Nixon in his Executive Order No. 11507, issued February 4, 1970.

You might be interested to know that some federal agencies in Kentucky have accepted state permits. A consistent federal response is necessary. Certainly that response should be no less than that expected from similar non-federal facilities in the Commonwealth.

We are returning the first two sheets of the application

form for completion of Items 6 and 12. Your full cooperation is earnestly solicited. We would appreciate receiving your response no later than Friday, December 8, 1972, so that the Commission can consider what further action it may desire to take at its December meeting.

Sincerely yours,

/s/ Frank P. Partee, Director
Frank P. Partee, Director

FPP/ce

Exhibit D

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF HEALTH
Frankfort

Wendell H. Ford
Governor

William P. McElwain, M.D.
Commissioner

November 29, 1972

Mr. Lynn Seeber
General Manager
Tennessee Valley Authority
411 New Sprankle Building
Knoxville, Tennessee 37902

Dear Mr. Seeber:

Since writing to you on November 10, 1972, concerning lack of compliance by federally owned facilities with Kentucky air pollution control requirements, the Attorney General here filed a complaint in the

United States District Court for the Western District of Kentucky (Louisville) on the same question.

This action was taken independent of the Commission, and the decision of whether or not to pursue a formal legal action on this matter is now obviously out of our hands. I regret that such action has been taken before the benefit of your response to our earlier inquiry.

Sincerely yours,

/s/ William P. McElwain
William P. McElwain, M.D.
Chairman
Kentucky Air Pollution
Control Commission

Exhibit E

January 19, 1973

Mr. Frank P. Partee, Director
Division of Air Pollution
Department of Natural Resources and
Environmental Protection
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

As provided for in APC-1, Section 1(1)(b) of the Kentucky Air Pollution Control Regulations, we are sending you TVA's proposed alternate sulfur dioxide control strategies for the Paradise and Shawnee power

plants and request your approval thereof. As explained in the statements, also enclosed, there are no feasible means for TVA to meet Kentucky's sulfur dioxide emission standard, which will be applicable for these two plants if the proposed alternate control strategies are not approved. However, such standard is not necessary to meet the sulfur dioxide ambient standards that have been established to fully protect public health and welfare from any known or anticipated effect of sulfur dioxide. Neither is the emission standard necessary to meet the requirements of the Clean Air Act for existing installations.

On October 13, 1972, TVA forwarded to you a control plan and schedule for achieving compliance with particulate emission standards at Paradise and Shawnee power plants. Since that time we have developed more detailed plans and schedules for achieving compliance with the particulate emission standards and these plans are also enclosed.

While all of the control plans and schedules reflect the best engineering decisions which can be made at the present time, better solutions for meeting the air quality standards may be devised in the future with additional engineering work. We will, of course notify you promptly of any intended changes. In addition, nothing contained in the plans should be construed as a waiver of any right to pursue any alternative which may be open to TVA under the Clean Air Act or any other applicable law.

If we can help in any way by providing additional

information, either in written form or in conferences with you or members of your staff, please let me know.

Sincerely yours,

/s/ F. E. Gartrell, Dr. P.H.
Director of Environmental
Planning

Enclosures Exhibit F

ENVIRONMENTAL PROTECTION AGENCY
REGION IV
1421 Peachtree St., N.E., Atlanta, Georgia . .309

October 17, 1972

Dr. F. E. Gartrell
Director of Environmental Research and Development
Tennessee Valley Authority
720 Edney Building
Chattanooga, Tennessee 37401

SUBJECT: Federal Agencies Compliance with Section 118 of Clean Air Act and Executive Order 11507

Dear Sir:

With reference to Section 118 of Clean Air Act, as amenled, Section 21 of the Federal Water Pollution Control Act, as amended, and Executive Order 11507, Federal facilities have a responsibility to cooperate with EPA and state pollution control efforts and programs. The purpose of this letter is to advise you of

these responsibilities and to recommend a course of action that will facilitate mutual Federal/State agreement on air and water pollution control compliance measures.

It is clear that Section 118 of the Clean Air Act requires Federal facilities to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans. As you are aware, there has been considerable discussion regarding appropriate procedural mechanisms for obtaining Federal agency commitments to install air pollution abatement equipment and to make progress reports demonstrating adherence to pertinent standards, emission limitations and compliance schedules. These discussions have also addressed the extent to which Section 118 requires Federal agencies to comply with state and local procedural requirements for reports, permits, registration, inspection and data.

Our advice on this matter, at this time, is to provide the data specifically requested by the states with the approved state air implementation plans and (2) the abatement action facilities must take in order to meet implementation plan requirements.

We recommend that each Federal facility under your jurisdiction which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compli-

BEST COPY AVAILABLE

ance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records. Whenever a state makes a reasonable and specific request to review operating records, we recommend that your agency adopt an open-door policy by providing the requested data. We do not, however, encourage the submission of continuous reporting of routine operating data except on an "as needed" basis.

If a state uses a registration procedure to obtain discharge information, Federal facilities should file registration forms. However, we do not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit application that will lead automatically to issuance of a state permit or license. The registration and other needed data should voluntarily be provided to the states by your agency. Our aim is to encourage Federal agencies to provide the states with all the information required to assess compliance of pollution sources with standards, emission and discharge limitations and the needs for additional abatement measures.

With respect to reporting of waste water treatment operations, we would like to make the same distinction as described above in regard to data needed to

determine if the facility is required to install additional abatement equipment or take other abatement measures as compared to routine operating data. If a state or EPA has reasons to believe that a waste water treatment facility is not adequate to meet water quality standards or is not being operated effectively, a specific request for information will be made. The facility should then provide, for a designated period of time, operating or monitoring data needed to complete that particular study and develop recommendations for additional remedial action.

We hope this advice and guidance will be beneficial to Federal facilities and aid them to respond to the immediate requirements of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. If you should have any comments or questions regarding this subject matter, please contact Mr. Arthur G. Linton Chief, Federal Activities Office, (telephone number 404-526-5253).

Sincerely yours,

/s/ Jack E. Ravan
Jack E. Ravan
Regional Administrator

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 26, 1973

Exhibit G

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: Federal Facility Compliance with Federal, State and Local Air Quality Standards and Emission Limitations

I am requesting your assistance on a matter of considerable urgency relating to implementation of the Clean Air Act and Executive Order 11507. The Federal government should be in a position to report to the President by October 1, 1973 (see attached Schedule of Events), that all Federal facilities covered by Federal, State or local air quality standards and emission limitations are either in compliance or that corrective action is proceeding in accordance with an approved compliance schedule. Further, we should also be in a position to determine that funds to initiate construction of the necessary pollution prevention and abatement projects have been requested in prior years or will be requsted in the FY 1975 budget or as soon as possible thereafter. Planning should be underway, or should commence immediately, in order to meet the FY 1975 budget deadlines. To achieve this necessary goal, may I request your assistance in accomplishing the following:

1. Notify your facilities to contact immediately

the appropriate State air pollution control agency in order to provide that agency with sufficient data to allow it to make a determination of facility and source compliance or non-compliance. I realize that in many cases this action is already complete or underway. I believe, however, that an additional initiative is needed to ensure 100% completion of the following actions in a timely manner:

> For sources not in compliance, a compliance schedule should be negotiated with the State. EPA Regional Administrators will assist in resolving difficulties should they arise.
>
> It is EPA's view, expressed last year, that Federal facilities are not required to apply for State operating permits. However, if a State's compliance schedule process is based on a permit system, I would ask that your facilities provide the State with the required information on its registration form. I believe the form should be signed to verify the data, but with an appropriate disclaimer to make it clear that the facility is not applying for a permit. (If you have instructed your facilities to apply for a State permit, the disclaimer would, of course, be unnecessary.) As you know, there are several court cases now underway to determine the legality of State permits for Federal facilities. I believe that while

> the courts resolve this issue the Federal government should proceed with great urgency to ensure that every source in violation of air quality standards and emission limitations is covered by an approved compliance schedule and that resources and funds are marshalled in order to adhere to these schedules

2. A listing, by State, of those facilities or air pollutant sources which are not in compliance and have not been covered by a State approved schedule as of December 31, 1972.

3. A listing, by State, of those facilities or air pollutant sources that have been determined by the States to be in compliance as of March 31, 1973.

4. A listing, by State, of those facilities or air pollutant sources that will be covered by a State approved compliance schedule as of March 31, 1973.

May I request that you provide listings 3 and 4 cited above to my Office of Federal Activities by March 31, 1973, and listing 2 to the same office by February 15, 1973. I further request that you notify your facilities as soon as possible on the urgency of cooperating with the States and EPA in arriving at approved compliance schedules.

To keep informed all participants involved in developing approved compliance schedules for Federal facilities,

Filed March 16, 1973

[Title Omitted in Printing]

MOTION TO DISMISS

Defendants William D. Ruckelshaus, Administrator, Environmental Protection Agency; Jack E. Ravan, Administrator, Region IV; Environmental Protection Agency; Environmental Protection Agency; General Creighton Abrams, Chief of Staff, United States Army; Robert F. Froehlke, Secretary, Department of the Army; Major General W. R. Dosbory, Commanding General, United States Army Armor Center and Fort Knox; Major General John Cushman, Commanding General; Colonel Ernest A. Vuley, Jr., Commanding Officer; Department of the Army; James

R. Schlesinger, Chairman, Board of Directors, Atomic Energy Commission; Robert E. Hollingsworth, General Manager, Atomic Energy Commission; B. W. Stiller, Manager, Paducah Gaseous Diffusion Plant, Atomic Energy Commission; Union Carbide Corporation; and Atomic Energy Commission move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedures, to dismiss the Complaint filed herein for lack of jurisdiction over the defendants and over the subject matter of the suit, and for failure to state a claim upon which relief can be granted.

WHEREFORE, the above-named Defendants request this Court to Dismiss the Complaint filed by Plaintiff.

The defendants request that this motion be set for oral argument at a time convenient to the court.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General
Land and Natural Resources
Division

MARTIN GREEN
Chief, Pollution Control Section

By: /s/ George J. Long
GEORGE J. LONG
United States Attorney

JAMES A. GLASGOW
Attorney, Department of
Justice
Washington, D. C. 20530
202-739-2808

Attorneys for Defendants

Attachments:

EXHIBIT NO. 1
EXHIBIT NO. 2
EXHIBIT NO. 3
EXHIBIT NO. 4
EXHIBIT NO. 5
EXHIBIT NO. 6

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

Exhibits 1 - 6

AFFIDAVIT OF ROBERT J. HART

Before me, Charles C. McNabb, Jr., as Notary Public in and for the State of Tennessee, County of Anderson, appeared Robert J. Hart, with whom I am personally acquainted, and who being duly sworn made affidavit as follows:

1. That he is Robert J. Hart, whose place of residence is 120 Newell Lane, Oak Ridge, Tennessee; that he is an employee of the Atomic Energy Commission, an agency of the United States of America; that his official position with the Atomic Energy Commission is Manager, Oak Ridge Operations Office; that the Paducah Gaseous Diffusion Plant, referred to in the

suit designated as Civil Action No. 7480-G, filed by the Commonwealth of Kentucky against the United States Atomic Energy Commission, in the Federal District Court at Louisville, Kentucky, is a facility owned by the United States of America as represented by the Atomic Energy Commission and under his management, control and jurisdiction; and that he is the Contracting Officer for the Government of the cost-type contract between Union Carbide Corporation and the United States of America, as represented by the Atomic Energy Commission (hereinafter referred to as AEC), under which Union Carbode Corporation manages, operates and maintains said facility for the AEC and in accordance with the directions and instruction of the AEC. Certified true copies of Modification No. 45 and No. 46 to Contract No. W-7405-Eng-26 between the United States and Union Carbide Corporation are attached as a part of this affidavit. Modification No. 45 is the latest complete rewrite and updating of the basic contract and prior modifications, and Modification No. 46 extends the contract term through June 30, 1973.

2. That the Paducah Gaseous Diffusion facilities include more than 100 buildings, including four major gaseous diffusion production buildings, two other major manufacturing buildings and associated buildings for, among other things, plant operation and control, plant shop and maintenance service, medical and dispensary services, plant heating and administration. The facilities are located on a tract of Government-owned land comprising some 3,670 acres. The Commission's investment for plant and equipment in these facilities is in excess of $795,000,000. The cost of operating and maintaining these facilities for the current fiscal year ending June 30, 1973, is estimated to be in excess of $95,000,000. This sum does not include the cost of feed materials for operation of the gaseous diffusion plants. Employed at the facility by Union Carbide Corporation are approximately 1,250 persons whose work and services are required for safe and efficient management and operation. AEC employees, as members of my staff, are physically stationed at the site for day-to-day surveillance of the operation for the AEC and general contract administration and program direction.

3. The purpose of the facility is the enrichment of uranium in the uranium isotope U-235. This involves the large-scale separation of the isotope U-235 from a chemical compound of uranium (in gaseous form) by the process of gaseous diffusion through porous barriers. These barriers must contain billions of holes smaller than two-millionths of an inch, withstand a pressure head of at least 15 pounds per square inch, and cannot be permitted to become enlarged or plugged up as a result of corrosion or rust coming from elsewhere in the system or as a result of the cooling of the gas and its reversion to a solid state. The separation process involves several thousand stages in each of which a portion of the gas-uranium hexafluoride (UF^6 — diffuses through the porous barriers and is enriched in U-235.

4. This process requires a continuous and un-

interrupted supply of electrical and other energy sources, controlled conditions of ventilation, temperature and humidity and a continuous and uninterrupted supply of materials. It involves in each of the several interconnected plants many miles of piping, many thousands of pumps and motors, and vast numbers of intricate electrical and electronic mechanisms to ensure proper operation. Electrical energy demand for the Paducah facility at present is some 16000 megawatts of which some 1000 megawatts is supplied by the Tennessee Valley Authority and some 600 megawatts by Electric Energy, Inc. The process system must be maintained under a negative atmospheric pressure. It must also be maintained as leakproof as possible to prevent decomposition of the circulating gas and damage to the operating equipment. The process once initiated must continue on a twenty-four-hour-per-day, seven-day-per-week basis since, among other things, the gas if permitted to lose temperature and cool in the system would revert to a solid state plugging and destroying the production process system. This is, of course, a very brief and simple statement of a very large and complex process operation.

5. The Paducah Gaseous Diffusion facility is a production facility of the United States as that term is defined in the Atomic Energy of 1954, and is one of only three such facilities owned by the United States and operated to supply the national need for enriched uranium. The other two such facilities are located one at Oak Ridge, Tennessee, and the other near Portsmouth, Ohio. All three facilities are under

the Oak Ridge Operations Office of AEC. The three gaseous diffusion facilities, while identical in many respects, are operated as a complex with each performing its portion or part of the overall process of producing the final product of enriched uranium materials to meet the needs of the United States for such product for national defense and peaceful uses of atomic energy such as fuel for nuclear power plants, medical uses, etc., and to meet the Nation's commitments to the "free world" nations for such material. Assuming continuous operation of the three at maximum capability and in the most efficient manner, the ability of the complex to meet the above needs is limited to only a short time period in the future. Thus, any disruption or slowdown of the process at any of these plants and reduction of the product produced would be a matter of serious national consequence.

Further affiant sayeth not.

/s/ Robert J. Hart
Robert J. Hart
Manager

Oak Ridge Operations Office
United States Atomic Energy
Commission

[Jurat Omitted in Printing]

Attachments:

1. Modification No. 46 to UCC
   Contract No. W-7405-Eng-26

2. Modification No. 46 to UCC
   Contract No. W-7405-Eng-26

STATE OF TENNESSEE }
COUNTY OF ANDERSON }

AFFIDAVIT OF JEROME F. WING

Before me, Charles C. McNabb, Jr., a Notary Public in and for the State of Tennessee, County of Anderson, appeared Jerome F. Wing, with whom I am personally acquainted, and who being duly sworn made affidavit as follows:

1. That he is Jerome F. Wing, whose place of residence is 714 Florida Avenue, Oak Ridge, Tennessee; that he is an employee of the Atomic Energy Commission, an agency of the United States of America; and that his official position with the Atomic Energy Commission at Oak Ridge, Tennessee (hereinafter referred to as AEC) is Chief, Environmental Protection Branch of the Safety and Environmental Control Division, Oak Ridge Operations Office, AEC.

2. That the Government-owned gaseous diffusion facility near Paducah, Kentucky, is one of the production facilities operated by the AEC and under the jurisdiction of the Oak Ridge Operations Office; that he is familiar with such facility and the duties and responsibilities of his office encompass the over-all evaluation and appraisal of the operation of the facility from an environmental standpoint.

3. That the AEC is in full accord with the program at both the State and national level to abate air and water pollutants; that AEC, Oak Ridge Operations Office, directly and through Union Carbide Corporation, the management and operating contractor at the Paducah gaseous diffusion facility, has an affirmative program and a competent professional staff to oversee, monitor and assure compliance with applicable air and effluent emission standards, including the air emission standards of the State of Kentucky, approved by the Environmental Protection Agency; and that AEC's and Union Carbide Corporation's professional environmental personnel have for a number of years had and maintained what was believed to be a cordial and cooperative working relationship with the State of Kentucky's professional environ-

mental personnel regarding both air and effluent emission sources at the AEC's Paducah facility.

4. That in 1968 the State transmitted to the operating contractor its forms for "Registration of Air Contaminant Sources" and by letter of July 3, 1968, to the State, AEC as a matter of comity and cooperation and using the State's forms identified the Paducah plant emission sources and supplied the State with the emission data from such sources, and invited the State Air Pollution Control Commission representatives to visit the site for further discussion and inspection of the plant operation.

5. On June 19, 1970, form APC-57, *Registration of Air Contaminant Sources,* was received from the Kentucky Air Pollution Control Commission relative to the Paducah gaseous diffusion facility and such form was completed and returned to the State Pollution Control Commission on July 2, 1970.

6. By letter dated June 15, 1971, the State transmitted its forms APC-110, *Permit Application For Air Contaminant Source,* relative to the Paducah gaseous diffusion facility. The information requested by these forms for air emission sources was completed using the State forms and returned to the State by letter from AEC dated July 23, 1971. The cover letter advised the State that while AEC did not consider the Kentucky permit requirements applicable to the Federal facility, AEC was happy to supply the information on a comity basis and as demonstrating the willingness of AEC to cooperate with the State within the framework of Executive Order 11507.

7. On June 29, 1972, Messrs. William S. Coakley

and Larry D. Wynn of the Kentucky Air Pollution Control Commission visited the Paducah gaseous diffusion facility for a meeting with AEC and Carbide environmental control staff and to review the air pollution abatement and monitoring practices relative to the facility's air emission sources. A number (some six or seven) of representative air emission sources were selected, visited and discussed. In the concluding critique, Messrs. Coakley and Wynn stated they were "favorably impressed" and appeared to be completely satisfied with AEC's pollution abatement program and with the data previously furnished the State.

8. To the best of affiant's knowledge and belief no emissions from any emission source at the Paducah gaseous diffusion facility exceeds the limitations provided for in the Kentucky air emission standards; and AEC has provided the State with air emission data for the Paducah gaseous diffusion facility emission sources sufficient to show that AEC is in compliance with the air emission standards or limitations of the State of Kentucky for air emission sources at such facility, and has supplied all information and data requested by the State or otherwise applicable to an emission source except for process information or data on a limited number of sources where such information or data is "Restricted Data" and classified national defense information relating to the plant production process which AEC is prohibited from disclosing to persons who are not authorized to receive such information under the Atomic Energy Act of 1954, as amended.

9. While AEC, as an agency of the United States, does not consider its operation of the Federal facility and

BEST COPY AVAILABLE

its performance of its Federal functions as subject to the State's permit requirements, it does intend and expects to continue to work closely with the State Air Pollution Control Commission to enhance the air environment of the State, to monitor air emission sources at the Paducah facility and keep records thereon and to furnish such information and data to the State insofar as national security and classification requirements will permit, and to continue to operate the facility so as to comply with the State's air emission standards and limitations.

Further affiant sayeth not.

/s/ Jerome F. Wing
Jerome F. Wing, Chief
Environmental Protection
Branch
Oak Ridge Operations Office
United States Atomic
Energy Commission

[Jurat Omitted in Printing]

STATE OF TENNESSEE
COUNTY OF ANDERSON

SUPPLEMENTAL AFFIDAVIT OF JEROME F. WING

Before me, Charles C. McNabb, Jr., a Notary Public in and for the State of Tennessee, County of Anderson, appeared Jerome F. Wing, with whom I am personally acquainted, and who being duly sworn made affidavit as follows:

1. That he is Jerome F. Wing and that his place of residence and position with the United States Atomic Energy Commission at Oak Ridge, Tennessee, is the same as is set out in item 1. of an affidavit sworn to and subscribed before Charles C. McNabb, Jr., on January 30, 1973.

2. That the purpose of this affidavit is to supplement and make more particular item 8. of his affidavit of January 30, 1973, in which he affirmed that "To the best of affiant's knowledge and belief no emissions from any emission source at the Paducah Gaseous Diffusion facility exceeds the limitations provided for in the Kentucky air emission standards."

3. That the AEC Gaseous Diffusion facility at Paducah, Kentucky, is in the Paducah-Cairo region under the Kentucky Air Pollution Control Regulations and that the priority classification of air quality for such region is Priority I for particulates, Priority II for SO^2 and Priority III for CO, NO^2 and OX (HC).

4. That the major air emission source of interest at such facility is the emissions from the Indirect Heat Exchangers (Steam Plant); that the steam plant contains three boilers and was originally coal fired; that several years ago the AEC recognized the difficulty of achieving SO^2 and particulate compliance with such a coal-fired plant and in 1970 as a part of its air environment enhancement program converted such plant to a natural gas-fired plant with No. 2 fuel oil as a backup fuel. The stack emissions contain no particulates and are not visible. There is no significant sulfur in the primary fuel and the sulfur in the backup fuel is of a concentration that when burned meets the emission limits. This emission source is obviously in compliance with Kentucky Regulations Nos. AP-3 and AP-4 on particulates and SO^2. The three boilers for this steam plant are existing installations having rated capacities of less than 300 million B.T.U.'s per hour and are exempt under Kentucky Regulation AP-7, *Control of Nitrogen Oxides Emissions.*

5. That under Kentucky Regulation No. AP-2, *Control of Open Burning,* xxxx burning activities are carried on at the Paducah Gaseous Diffusion facility xxxxx.

6. That two existing incinerators are operated at the facility. The C-200 classified paper incinerator emission has an opacity less than Shade #1 on the Ringelmann Chart. The C-405 incinerator is equipped with a flue gas scrubber and for brief periods may exceed Shade #1 but not Shade #2 or the opacity guidelines as specified for existing incinerators in Kentucky Regulation No. AP-3, Section 1. (3) (a) and (b).

7. That for process operations particulate emissions, none of the some 25 process vents or emission sources emit visible particulate matter or any quantities in excess of those specified in Table 3.2 of Kentucky Regulation No. AP-3, Section 3.

8. Kentucky Regulation No. AP-5, *Control of Hydrocarbon Emissions From Stationary Sources,* is applicable to existing installations with respect to hydrocarbons which are in those regions classified as Priority I. The Paducah-Cairo region is classified as Priority III for hydrocarbons. Kentucky Regulation No. AP-6, Control of Carbon Monoxide Emissions, likewise is applicable to existing installations in those regions classified as Priority I. The Paducah-Cairo region is classified as Priority III for carbon monoxide.

9. That the Paducah Gaseous Diffusion facility in its air emissions is in compliance with the ambient air quality standards as specified in Kentucky Regulation No. AP-9, Sections 1. and 2.

10. That the basic information and arithmetical data substantiating the above compliance with the Kentucky Air Pollution Control standards and limitations was furnished to the State of Kentucky in July 1971; that the basic operation of the facility remains unchanged from that date; and that such information and data can be furnished to the Court if it so desires.

Further affiant sayeth not.

/s/ Jerome F. Wing
Jerome F. Wing, Chief
Environmental Protection
Branch
Oak Ridge Operations Office
United States Atomic Energy
Commission

[Jurat Omitted in Printing]

AFFIDAVIT

I, E. D. H. Berry, Colonel, Corps of Engineers, do hereby swear under oath that I am the Director, Facilities Engineering, US Army Armor Center and Fort Knox, Fort Knox, Kentucky, and that I have held this position since May 1972.

The purpose of this affidavit is to relate to the Court the actual state of air contaminant sources at Fort Knox, in reference to the general allegations made in paragraphs 28, 35, and 36 of the Complaint in the case of *Commonwealth of Kentucky* v. *Ruckelshaus, et al.*

In the order presented in paragraphs 28 and 35 of the above-mentioned Complaint, the following is a listing of present sources at Fort Knox classified as air contaminants and requiring registration under Kentucky regulations:

1. There are currently 48 oil burning indirect heat exchangers in the 0-10 million BTU per hour input range. For these units, the particulate emission rate is .107 (all references to emission rates for indirect heat exchangers will be given in pounds per million BTU input per hour), and the sulfur dioxide emission rate in .121. These rates are within the Kentucky standards for particulates of .75 [Table 3-1, Reg. No. AP-3 (all AP citations may be found in Exhibit B to the Complaint)] and for sulfur dioxide of 2.5 of 2.0 [Sec. 1(4), Reg. No. AP-4].

2. Two years ago there were 159 coal-fired indirect heat exchangers in the 0-10 million BTU per hour input range. 18 of these units are in buildings scheduled for tear down. (5 have already been torn down, 10 more are scheduled for tear down in 1973, and the remaining 3 are scheduled for fiscal year 1978.) 12 units have been converted to natural gas. 10 units are in the process of being converted to No. 2 fuel oil (6 of which are convertible from gas to oil, see subparagraph 7 below. As of 1 March 1973, this project was 85% complete, and the estimated completion date was 18 April 1973. The contract number is DACA 31-72—C-0191). 86 units are under contract for conversion to No. 2 fuel oil (50 of which are convertible from gas to oil, see subparagraph 7 below), with an expected completion date around November 1973. (The contract, DACA 31-73-C-0073, has been awarded, but work has not begun yet.) The remaining 33 were originally planned to be converted by personnel from my Directorate. However, lack of sufficient operations

and maintenance funds delayed accomplishment of these plans. Therefore, I have requested that this work be added as a supplement to the existing fuel conversion project under contract. (My office has sent preliminary information on this supplement to the Baltimore District Office of the Corps of Engineers. They in turn will supply my office with designs for the project. We then will submit the project to Headquarters, First U.S. Army, for approval. If approval is received, this project would be a supplement to contract DACA 31-72-C-0191, and the work could be completed by the end of 1973.) These 33 units exceed Kentucky emission rates — actual particulate emission rate is .77, allowable is .75 (Table 3-1, Reg. No. AP-3); actual sulfur dioxide emission rate is 5.24, allowable is 4.0 or 3.5 [Sec. 1(4), AP-4].

3. There are currently three incinerators utilized on Fort Knox. One is used to burn classified wastes and is within Kentucky emission rates — actual particulate emission rate is approximately .12 grains per standard cubic foot converted to 12% carbon dioxide, allowable is .20 grains converted to 12% [Sec. 1(3)(e)(ii), AP-3]. The other two incinerators are used to destroy pathological waste at Ireland Army Hospital. An air pollution survey of Fort Knox by the US Army Environment Hygiene Agency in 1967 did not mention these incinerators as excessive pollution sources. A similar survey in 1971 recommended that they be tested to determine whether they complied with Kentucky standards. This test was requested by this headquarters but was postponed by the Hygiene Agency several times due to manpower shortages. It was finally conducted on 30 January 1973, and it was determined that the incinerators exceeded Kentucky emission rates. In light of this information, I have directed my office to develop a project and request necessary funds to replace these two incinerators with a single unit meeting the Kentucky particulate emission standard. This project appears to be within the scope of operations and maintenance funds which can be approved either locally or at Headquarters, First U.S. Army, depending on the exact cost. This headquarters intends to design the project and have it ready to advertise for bids by the end of the second quarter of fiscal year 1974. Actual award of the contract and completion of work will be entirely contingent upon the availability of funds.

4. There are approximately 375 coal-fired stoves on the reservation. It is unlikely for more than 25% of these units to be used at any one time. These stoves are small units (approximately 60,000/BTU hour input) which are used as small space heaters, mainly in tents by soldiers in the field. They probably do not require registration, being analogous to the indirect heat exchangers used in residential buildings excepted by Section 4(4)(c), AP-1. If they are not so exempt, they do exceed the Kentucky emission limitations.

5. Stone crushing processing occurring on this installation complies with Kentucky regulations. Reasonable precautions are taken to prevent particulate matter from becoming airborne. Any dust which does arise settles out of visibility before crossing the boundaries of Fort Knox (Sec. 4, AP-3). Inasmuch as crushed stone is available from local sources, an engineering survey is underway to determine if stone can be economically purchased commercially.

6. Not mentioned in paragraph 28 of the Complaint but alluded to in paragraph 35, there are 1,441 gas-fired indirect heat exchangers at Fort Knox which would be classified as air contaminant sources under Kentucky regulations. These units are well within the Kentucky emission rates — actual particulate emission rate is .018, allowable is .75 (Table 3-1, AP-3); actual sulfur dioxide emission rate is .0057, allowable is 2.5 or 2.0 [Sec. 1(4), AP-4].

7. Finally, after completion of the contracts mentioned in subparagraph 2 above, there will be 93 units on post (including the 56 mentioned in subparagraph 2 above) which may be fired from either gas or oil. These units will primarily be fired by gas, but they will be changed to oil during extremely cold weather in order to preserve natural gas. Regardless of which fuel is used, under subparagraphs 1 and 6 above their emissions will be within Kentucky limitations.

8. There are no other known sources at Fort Knox which would require registration under Kentucky regulations.

The information outlined above is true and complete to the best of my knowledge.

/s/ E. D. H. Berry

E. D. H. BERRY
Colonel, Corps of Engineers
Director of Facilities

[Jurat Omitted in Printing]

AFFIDAVIT

State of Kentucky }
}
County of Fayette }

I, ERNEST A. VULEY, JR., being first duly sworn, depose and say that I am a Colonel, United States Army, presently assigned as the Commander, Lexington-Blue Grass Army Depot, Lexington, Kentucky.

In this position I am responsible for all operations of the installation. In the performance of its mission:

The Lexington-Blue Grass Army Depot, Blue Grass Activity, has a total of thirteen coal fired indirect heat exchangers having rated input capacities ranging from 1,000,000 BTU/hr to 7,800,000 BTU/hr. Based upon Preliminary Air Pollution Engineering Survey No. 21-007-71, conducted by US Army Environmental Hygiene Agency, Edgewood Arsenal, it would take sixteen of these units of this rated capacity to produce sufficient particulate emissions before the allowable limits would be exceeded. It was recommended that the units of this capacity be converted to No. 2 fuel oil to reduce particulate emissions. Three of these units have already been converted. Approval has been received for the conversion of the ten remaining units, funds have been allocated and material ordered to complete the conversion. It is expected that this project will be completed by 15 October 1973.

The Lexington-Blue Grass Army Depot, Ammunition Division, Directorate for Distribution and Transportation, operates a deactivation furnace at the Blue Grass Activity for the purpose of salvaging metallic components of deteriorated small arms ammunition and other small encased explosives. The burning process destroys the explosive materials and permits recovery of metal. An average of approximately five hundred tons per year are processed in this manner.

The Lexington-Blue Grass Army Depot, Lexington Activity, operates a central heating plant containing three coal fired spreader stoker boilers of a total rated input capacity of 143,000,000 BTU/hr. Combustion gases are vented to the atmosphere through a common stack. Engineering calculations indicate that particulate emissions from this plant exceed the allowable limits. Currently an approved Military Construction Army project is included in the FY-73 program. This project includes the installation of a cyclone collector, which will reduce particulate emissions by eighty-five percent. Estimated completion date 15 October 1973.

The depot has nine natural gas fired indirect heat exchangers which are used in family housing units. The furnaces have a rated capacity of approximately 50,000 BTU/hr, which is well within the prescribed standards. No additional control measures are deemed necessary for these units.

In addition to the contaminant sources cited above, the following operations are conducted at this installation which result in the generation of air contaminants:

(1) Open burning and detonation of military explosives and propellants. This operation is an accepted method of disposal. The contaminants released are minimal because burning is performed under strictly controlled surveillance;

(2) The operation of forty-seven No. 2 fuel oil fired indirect heat exchangers, forty-three of which have rated capacities less than 3,000,000 BTU/hr. Four units have rated capacities between 5,800,000 BTU/hr and 13,800,000 BTU/hr. The emissions from these units do not exceed allowable limits, therefore, no additional control measures are necessary; and

(3) Other areas of operation at this installation do generate emissions that are classified as air contaminants, such as electroplating, spray painting, solvent cleaning, sandblasting and wood working. The amount of emissions from these operations is insignificant, however, control measures have been taken to further minimize their environmental impact by installing hoods and air filtration systems.

IN WITNESS WHEREOF, I have set my hand this 2nd day of March, 1973.

/s/ Ernest A. Vuley, Jr.
ERNEST A. VULEY, JR.
COL, QMC
COMMANDING OFFICER

[Jurat Omitted in Printing]

[Title Omitted in Printing]

Affidavit

Before me, the undersigned authority, at Fort Campbell, on this 28th day of February 1973, personally appeared Mr. Robert Anderson, known to me to be the person whose name is subscribed to the following statement, who after being duly sworn deposes and says that:

1. The affiant is a resident of Hopkinsville, Kentucky.

2. The affiant has read the complaint in the above styled case and currently serves as Deputy to the Facilities Engineer. The Directorate of Facilities Engineer is the defendant's, Major General John H. Cushman, staff agency which has the responsibility for the operation and control of the air contaminant sources listed in paragraph 28(d) of the complaint.

3. Attached to this affidavit is a comparative listing of the Kentucky Emission Standards and computed emissions for each item listed in the complaint. The computed emissions are based on tables contained in a booklet entitled "A Compilation of Air Pollution Emission Factors for Combustion Processes, Gasoline Evaporation, and Selected Industrial Processes", published in May 1965 by the US Department of Health, Education and Welfare, Public Health Service, Division of Air Pollution, Cincinnati, Ohio. This listing will show all heating plants using gas and/or fuel oil are in compliance with the Kentucky standards as published by the Kentucky Air Pollution Control Commission. No actual test of the emission sources was made.

4. The attached comparison shows that Item 6, Item 7 and Items 9 and 10 are not presently in compliance with the Kentucky standards. The following additional information is added with respect to those items:

a. Item 6 — Building 7205. Although computations indicate that emissions from this plant slightly exceed the standards, it should be noted that it only operates five to six months out of the year. It is proposed to convert this plant to natural gas, thus, complying with the Kentucky standards in FY 1975. This conversion could be accomplished at an earlier date if additional natural gas becomes available from our supplier.

b. Item 7 — 25 buildings in the 5800, 5900, and 6100 blocks. These heating plants are also only operated five to six months per year. They may be fired but are not required to be fired unless the temperature falls below 35°F. Nine permanent gas fired motor repair shops programmed for construction in FY 1977 MCA program will replace these 25 temporary buildings. Fort Campbell has

requested appropriations for this project every year since 1966. However, this request has only been proposed to Congress once in FY 1970, and appropriations for construction were reused. Replacement of these shops has been requested because the buildings are badly in need of replacement and not necessarily to correct an air pollution problem. Thus, when the requirement came to eliminate air contaminant sources, conversion of these heating systems did not seem appropriate because of our projected plans to replace the buildings altogether. Further, the natural gas supplier for Fort Campbell has stated that he will only supply fuel for newly constructed facilities and not for converted heating systems. Conversion to natural gas is not possible now because that fuel is not available. Also, other cleaner burning fuels which would meet Kentucky standards are in short supply. Accordingly, Fort Campbell is waiting for approval for the funds necessary to construct these new motor repair shops to replace the buildings listed in Item 7 of the complaint. Presently, the appropriations are planned for in the 1977 MCA program. It should be noted at this point that in requesting the approval of programs for construction of the nine motor repair shops, elimination of an air contaminant source was not listed as a basis for approval action. However, when this program comes to the short range planning phase, this matter will be brought out. In addition to the twenty-five buildings listed in the complaint, Fort Campbell has fourteen additional motor repair shops with similar heating facilities now in operation. Since August 1972, the requirement to furnish these additional facilities has been placed on the Directorate of Facilities Engineering by the development of the 101st Airborne Division to a complete state of operational readiness. There are no other facilities available at Fort Campbell that would meet the minimum needs of the 101st Airborne Division and thus preclude the necessity of operation of these additional air contaminant sources. The additional buildings are planned for replacement in future MCA programs.

c. Items 9 and 10 — Buildings 6550 and 6548. These plants are also used only for space heating and operate some five to six months per year. These are temporary aircraft maintenance shops and will be replaced by permanent facilities that are either already under construction, approved by Congress for construction or proposed for construction in FY 1974 MCA program.

5. Further affiant sayeth not.

/s/Robert Anderson
ROBERT ANDERSON
Deputy Director
Facilities Engineering

[Jurat Omitted in Printing]

Complaint Building Number	Plant Capacity In Million BTU/HR	TYPE FUEL	KY. EMISSION STANDARD PARTICULATES (Lb/Million BTU)	KY. EMISSION STANDARD SO2 (Lb/Million BTU)	COMPUTED ACTUAL EMISSIONS PARTICULATES (Lb/Million BTU)	COMPUTED ACTUAL EMISSIONS SO2 (Lb/Million BTU)
Pathological incineration for which Kentucky issued construction permit						
2996	5.6	Gas	0.56	—	0.019	—
98	3.7	Gas	0.56	—	0.019	—
157	118.3	Gas	0.31	—	0.019	—
		Gas	0.31	1.7	0.084	0.33
7106	25.8	Gas	0.45	—	0.019	—
		Gas	0.45	2.2	0.084	0.33
7205	2.7	Coal	0.56	4.0	1.3	4.36
25 Bldgs in 5800; 5900 (Total for all bldgs) and 6100 Blocks	8.7	Coal	0.56	4.0	0.74	4.36
6256, 7042 and 7049 (Total for all bldgs)	8.4	Gas	0.56	—	0.019	—
6550 (Total for all 6 furnaces)		Coal	0.56	4.0	0.74	4.36
6948	0.576					
6926, 6938 and 6944	54.3 (Total for all 3 bldgs)	Coal	0.56	4.0	0.74	4.36
		Gas	0.375	—	0.019	—
6936	9.6	Gas	0.33	—	0.019	—
7251	22.5	Gas	0.43			
		Oil	0.43	2.22	0.084	0.33

Filed March 27, 1973

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS, TVA, WAGNER, SEEBER, McPHERSON AND CAVANISS

Comes the plaintiff, Commonwealth of Kentucky, Ex Rel Ed W. Hancock, Attorney General and moves the court for a summary judgment against the defendants, Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss on the ground that the pleadings of plaintiff with the affidavit of Harold G. Peters (attached as Exhibit 1), and the pleadings and exhibits of these defendants, shows that there is no genuine issue as to any of the following material facts: (1) Kentucky's permit system is its substantive control and abatement program for air pollution: (2) TVA owns and operates the Shawnee and Paradise Power Plants in Kentucky; (3) that each power plant has coal-fired boilers which emit air contaminants into the atmosphere of Kentucky (Exhibit 2): and (4) after having been requested to do so, TVA has refused to apply for and obtain a permit as required by Kentucky Air Pollution Control Commission Administrative Regulation AP-1. Plaintiff contends it is entitled to a summary judgment as a matter of law

against these defendants. Plaintiff's brief in support of this motion is attached hereto.

Plaintiff requests that this Motion be set for oral hearing at the convenience of the Court.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

/s/ Kenneth A. Howe, Jr.
Kenneth A. Howe, Jr.
Assistant Deputy Attorney General
Capitol Building
Frankfort, Kentucky 40601

/s/ David C. Short
David C. Short
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

/s/ David D. Beals
David D. Beals
Assistant Attorney General
Capitol Building
Frankfort, Kentucky

COUNSEL FOR PLAINTIFF

[Certificate of Service Omitted in Printing]

Exhibit 1

AFFIDAVIT

The affiant, HAROLD G. PETERS, after having been first duly sworn, states as follows:

1. Affiant is employed in the Division of Air Pollution Control, Department of Natural Resources and Environmental Protection for the State of Kentucky. During most of 1972, I held the position of Acting Director of the Engineering Program of the Kentucky Air Pollution Control Commission. The Department of Natural Resources and Environmental Protection is the successor organization to Kentucky Air Pollution Control Commission, Department of Natural Resources and the Department of Environmental Protection.

2. Affiant's educational background includes a Bachelor of Science in Chemical Engineering from the University of Louisville, and a Masters Degree in Engineering from the University of Louisville and the University of Kentucky. I began my air pollution control work in June, 1965, as a Senior Sanitary Engineer with the Kentucky Department of Health.

3. Affiant states that the permit system of the Division is governed by Section 5, Kentucky Air Pollution Control Commission Administrative Regulation AP-1, and is separated into three parts, namely, construction, operating, and temporary operating per-

mits. The construction permit is required when a new air contaminant source is proposed or when an existing one plans an equipment addition or modification. All existing sources are required to apply for an operating permit and those sources operating an improper control system prior to compliance testing may receive a temporary operating permit which terminates at a specified time as noted as a condition to the permit.

4. Affiant states the processing of a permit application to operate normally begins with the Division's solicitation of permits from existing facilities. Upon receipt of the submittal, engineering evaluation determines the source's capability in meeting regulatory requirements, then the evaluating engineer either recommends approval or denial of the permit to operate.

5. Affiant states that the overall function of the permit system is to insure that installed or proposed air pollution control devices be of sufficient collection efficiency to minimize the pollution potential to within allowable limits. Also, existing facilities which are not in compliance are requested to submit a compliance schedule as part of the operating permit applications incorporating specific steps to be taken and definite measures to be followed.

6. Affiant states the permit application processing for a new source incorporates, in addition to the engineers in office evaluation of potential air pollution emissions, a field trip to inspect the facility capa-

bility to meet allowable limits, prior to approval of an operating permit.

7. Affiant states the permit system constitutes the preventative arm of the Division's air pollution control program and an effective tool for reducing air pollution from stationary sources; first by preventing operation of equipment which emits air contaminants in excess of allowable limits and, second, by preventing construction of uncontrolled sources. In the last case, the applicant reaps the cost benefit of installing control devises at the time of construction, rather than the more expensive retrofit procedure required on an existing facility.

8. Further, the affiant sayeth not.

/s/ Harold G. Peters

HAROLD G. PETERS

[Jurat Omitted in Printing]

CERTIFICATE

I, John Smithers, Acting Director of the Division of Air Pollution, Department of Natural Resources and Environmental Protection, state that I am the custodian of the records of the Division, which has its office and place of business for the Department at 311 E. Main Street, Frankfort, Kentucky. As the custodian of the records of the Division, I certify that the attached copy of a letter of August 14, 1972, and copies of the permit application forms from the Tennessee Valley Authority [Subject completed, unsigned Permit Application forms ommitted in herein Appendix] were received by the Kentucky Air Pollution Control Commission on August 15, 1972, and are true copies of same from the files of the Division of Air Pollution of the Department of Natural Resources and Environmental Protection which is the successor agency to the Kentucky Air Pollution Control Commission.

/s/ John T. Smithers

John Smithers

Acting Director of Division
of Air Pollution

Department of Natural
Resources and Environmental
Protection

TENNESSEE VALLEY AUTHORITY
CHATANOOGA, TENNESSEE 37401

August 14, 1972

Mr. Frank Partee, Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

With regard to the air contaminant source permit application forms that your staff sent us on July 13, 1972, it is our view that TVA, as a Federal agency, is not required to secure state permits in order to continue carrying out its operations and functions under the TVA Act, and it would accordingly not be appropriate for it to apply for permits. We are, however, anxious to cooperate with the State of Kentucky in the attainment of its declared air quality goals. We are therefore pleased to supply you with the same emission data and other information for TVA's Paradise and Shawnee power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations. For your convenience in utilizing the information we are supplying it on the APC permit forms even though, as indicated above, by using such forms we are not thereby applying for the issuance of permits. I shall be glad to answer any questions you may have concerning this position.

TVA is currently studying and evaluating possible alternative control measures which we might apply at those

TVA operations in Kentucky where emissions now exceed the emission standards contained in the Kentucky air pollution control regulations. We anticipate completing our plans and schedules for controlling particulate emissions by October 9, 1972. We will supply you with the copies thereof which we will be glad to discuss if you so desire. On the other hand, meeting Kentucky's standards

On the other hand, meeting Kentucky's standards with respect to sulfur dioxide emissions presents a more difficult problem. As you know, proven technology is not available to provide effective sulfur dioxide controls for large power plants and supplies of low sulfur fuels are presently not available to TVA in adequate quantities. The Environmental Protection Agency has recognized this state of affairs in the May 31, 1972, *Federal Register*. Although TVA is in the process of locating sources of low sulfur coal and will continue to carry out its extensive research program on the removal of sulfur dioxide from stack gases, it will be unable to submit a meaningful emission control plan for sulfur dioxide by January 1, 1973. As a consequence, TVA intends to submit an alternate control strategy to meet Kentucky's ambient air quality standards for sulfur dioxide. Such an alternate control strategy will be submitted by a date which will allow a reasonable time for the Commission to review the strategy and make recommendations and for TVA to make any necessary modifications before January 1, 1973. Although the details of our strategy are not yet available, we are enclosing a plan of the proposed ambient air quality monitoring which will be used to demonstrate that our strategy will achieve and maintain the applicable ambient air quality

standards. Should the Commission be unable to approve TVA's strategy before January 1, we hereby respectfully request an extension of the January 1 deadline until such time as TVA is able to satisfy the Commission with an acceptable alternate control strategy. Please advise us promptly if such an extension would be granted, as this information is essential in order for us to determine whether we must seek an exception from the Kentucky Standards pursuant to the Federal Clean Air Act.

TVA owns the mineral rights to several coal mines in Kentucky; however, only the Camp Breckenridge property in Union County is presently being mined. Since this mining is conducted by the Peabody Coal Company pursuant to the terms of a standard type coal lease which provides for a royalty to TVA based on tonnage mined, it is our view that Peabody is responsible for reporting any coal refuse piles. Therefore, no coal refuse information is supplied herein.

If we can help in any way by providing additional information at this time on our operations in Kentucky, either in written form or in conferences with you or members of your staff, please let us know.

Sincerely yours,

/s/ F. E. Gartrell
F. E. Gartrell, Dr. P. H.
Director of Environmental
Research and Development

Enclosures*** Completed, unsigned permit application of TVA omitted in printing.

Rendered 6-13-73
Entered 6-13-73

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE**

COMMONWEALTH OF KENTUCKY,
ex rel. ED W. HANCOCK,
Attorney General, **Plaintiff**

v.

WILLIAM D. RUCKELSHAUS,
Administrator, Environmental
Protection Agency, et al, **Defendants**

Civil Action No. 7480-G

ORDER

The Court, on its own motion, sets all pending motions in this action for oral argument at the hour of 10:00 A.M., on Monday, July 9, 1973, in the Court's chambers in Louisville, Kentucky.

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record.

Filed June 28, 1973
[Title Omitted in Printing]

MOTION

COMES the plaintiff and moves the Court to permit the filing of plaintiff's SUPPLEMENTAL BRIEF in this action and for support of said Motion states that defendant Tennessee Valley Authority has submitted an Alternate Control Strategy for approval by the Commonwealth of Kentucky which action is inconsistent with the position stated in their Briefs and their Motions before the Court in this action.

NOTICE

The defendants will take NOTICE that the foregoing MOTION will be delivered to the Clerk of the

United States District Court for the Western District of Kentucky, Louisville, Kentucky, this the 28th day of June, 1973, fr filing and to be considered at the convenience of the Court.

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

/s/ David C. Short
By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL

/s/ David D. Beals
By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR PLAINTIFF.

[Certificate of Service Omitted In Printing]

Rendered: 7-9-73
Entered: 7-11-73

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY, ex rel
ED W. HANCOCK, Attorney General

vs. CIVIL ACTION NO. 7480-G

WILLIAM D. RUCKELSHAUS, Administrator
ENVIROMENTAL PROTECTION AGENCY, et al

ORDER

This case came on for hearing in the Court's chambers on Monday, July 9, 1973, and there appeared Honorable David Short and Honorable David Beals, Assistant Attorney Generals, on behalf of the Commonwealth of Kentucky; Honorable Robert Trevey, on behalf of the Department for Natural Resources & Enviromental Protection; Honorable James Glasgow, on behalf of all defendants, except T.V.A. and its officials; Honorable George J. Long, United States Attorney; Honorable Herbert Sanger, Honorable Beauchamp Brogan and Honorable Justin Schwamm, on behalf of the Tennessee Valley Authority and its officials; Honorable K. D. McCasland, on behalf of the Atomic Eenergy Commission; and Honorable Wilson Horde, on behalf of the Union Carbide Corporation.

Oral arguments of the parties having been heard, the Court finds the plaintiff has standing to bring this action but same may not be brought under the rules as a class action.

IT IS FURTHER ORDERED that the motion for summary judgment on behalf of all defendants, except T.V.A. and its officials; and the motion for summary judgment on behalf of Tennessee Valley Authority and its officials, be and the same are hereby SUSTAINED. Accordingly, counsel for the defendants shall each prepare and tender to the Court a proposed memorandum opinion reflecting the Court's expressed legal views as respects their clients.

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

DATED: July 9, 1973
Copies to all counsel.

Rendered: 8-10-73
Entered 8-13-73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY,
Ex Rel ED W. HANCOCK,
Attorney General, Plaintiff

v. Civil Action No. 7480-G

ROBERT FRI,
Acting Administrator,
Environmental Protection Agency,
et al, Defendants

MEMORANDUM AND ORDER

This suit, brought on behalf of the Commonwealth of Kentucky by State Attorney General Ed W. Hancock, raises an important question concerning the authority of the States to regulate Federal activities and installations[1] under the Clean Air Act of 1970, 42 U.S.C. Section 1857 et seq. In general, the plaintiff asserts that Federal entities operating equipment or installation which emit air contaminants *must secure a permit* from the Kentucky

---

1. The Federal installations in question are: (1) Fort Campbell, Kentucky (home of the 101st Airborne Division); (2) Lexington-Bluegrass Army Depot, Lexington, Kentucky; (3) United States Army Armor Center and Fort Knox, Fort Knox, Kentucky; (4) Paducah Gaseous Diffusion Plant, Paducah, Kentucky, and (5) Installations operated by Tennessee Valley Authority.

Polution Control Commission before operating such equipment. The permit requirement in question appears in Section 5 of the Kentucky Air Pollution Control Commission Regulations AP-1. Section 5, which was part of the air implementation plan which Kentucky submitted to the Federal Government pursuant to Section 110 of the Clean Air Act of 1970, 42 U.S.C. Sec. 1857f provides in pertinent part as follows:

> (1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, *unless a permit therefor* has been issued by the Commission and is currently in effect. (Emphasis ours.)

The plaintiff further alleges that "Kentucky's Plan became Federal law pursuant to Sections 110, 113, and 118 of the Clean Air Act of 1970 . . . [and] Section 118 of the Clean Air Act of 1970 requires that 'federal facilities' comply with the approved Kentucky Plan . . ." Complaint, page 13.

In his prayer for relief, the Attorney General seeks a mandatory injunction requiring the defendants[2], except for the Environmental Protection Agency and its defendant-officers, to "apply for and to obtain permits from

2. All of the defendants except the Tennessee Valley Authority (TVA) and its officers were represented by the United States Department of Justice. The TVA was represented by its own attorneys. For clarity, the defendants are sometimes alluded to as (1) non TVA defendants; and (2) TVA defendants.

the Kentucky Air Pollution Control Commission . . ." (Complaint p. 25). Also, a prohibitory injunction is sought restraining the defendants "from refusing to comply with the provisions of Section 118 of the Clean Air Act of 1970." (Complaint p. 25). With respect to the EPA and its officers, the prayer requests that they be "[o]rdered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by the defendants . . . with the Kentucky plan . . . ." A declaratory judgment and relief in the nature of mandamus are also sought.

The TVA defendants moved to dismiss, or, in the alternative, for summary judgment. A motion to dismiss was filed by the non-TVA defendants. The plaintiff countered with a motion for summary judgment against the TVA defendants.

When these motions came on for hearing, it was apparent that it would be necessary, in the disposition thereof, that the Court consider matters in the nature of all affidavits and exhibits outside the pleadings. Rule 12b, F.R.C.P. Accordingly, it was agreed by all parties by counsel, that there being no issue of material fact as pertained to the legal defenses asserted, the Court without objection, considered the entire matter as on cross-motions for summary judgment.

Only issues of law are before this Court.[3] These

3. The non-TVA defendants have submitted affidavits attesting that their installations, with a few minor exceptions which are being corrected, are in compliance with Kentucky's emission standards. The plaintiff has made contrary allegations. These factual disputes need not be tried,

issues are: (1) whether the Clean Air Act of 1970 requires that the defendants obtain state permits before operating equipment which emits substances into the ambient air and (2) whether the doctrine of sovereign immunity is a barrier to maintenance of this suit.

THE PERMIT ISSUE

Congress recognized that Federal facilities emitted appreciable amounts of various substances into the ambient air. Therefore, it provided in Section 118 of the Clean Air Act for control of pollution from Federal facilities. In pertinent part, Section 118 provides as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property of facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

---

however, since matters of law control the disposition of the case. TVA has submitted to Kentucky detailed information concerning emissions from its facilities as required by Kentucky and in the form requested. TVA has also submitted plans and schedules for complying with Kentucky's emission standards. In furnishing such information, however, TVA informed Kentucky that while TVA fully intends to comply with its obligations under Section 118 of the Clean Air Act, those obligations do not include securing of state permits (Affidavit of Lynn Seeber). TVA accordingly has not applied for or obtained permits.

The question which is squarely before this Court is whether Congres intended, by enacting Section 118, to require the Federal Government to obtain permits from state agencies before operating equipment which generated air contaminants. Since this question must be answered in the negative, the defendants' motions must be granted.

All defendants contend that the requirement, in Section 118, that Federal entities "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution" simply means that Federal facilities must comply with the emission standards and implementation plans of Sections 109 and 110 of the Act and, except for new facilties, the monitoring and other requirements of Section 114. The legislative history of the Act supports the defendants' interpretation of Section 118.

The Clean Air Act of 1967, 77 Stat. 392, Section 111, required that Federal agencies shall "to the extent practicable and consistent with the interest of the United States and within any available appropriations, cooperate with the Department of Health, Education and Welfare and with any air pollution control agencies in preventing and controlling the pollution of the air . . ." This provision was changed by the Clean Air Act Amendments of 1970. The following analysis of the legislative history of Section 118 of the Clean Air Act provides an indication of Congress' intent concerning the change from the provision in the 1967 Act to the one in the 1970 Amendments.

On June 10, 1970, the House of Representatives

passed H.R. 17255, a bill to amend the Clean Air Act of 1967. This bill would have required each Federal agency to "comply with the applicable Federal, State, interstate, and local *emission standards* and with the purpose of this Act . . ." [emphasis supplied]. H.R. 17255, 91st Cong., 2d sess., sec. 111 (1970). The House Report on the bill states, "The legislation directs Federal agencies in the executive, legislative and judicial branches to comply with applicable Federal, State, interstate, and local *emission standards.*" H. Rept. No. 91-1146, 91st Cong., 2d sess., p. 4 (1970). On September 22, 1970, the Senate passed S. 4358, a different bill to amend the Clean Air Act of 1967. The bill would have directed each Federal agency to "comply with the *requirements* of this Act in the same manner as any other person would so comply . . . " [emphasis supplied]. S. 4358, 91st Cong., 2d sess. sec. 118 (1970). The Senate Report on the bill states, "This section requires that Federal facilities meet the *emission standards* necessary to achieve ambient air quality standards as well as those established in other sections of Title I" [emphasis ours] S. Rept. No. 91-1196, 91st Cong., 2d sess., p. 23 (1970). Other sections of Title I of the Senate bill set forth emission standards for "new sources" (§112), "selected air pollution agents" (§114), "hazardous air pollution agents" (§115), and inspection, monitoring and entry provisions (§116). The above statement from the Senate Report clearly indicates that the "requirements" which the Senate bill would have Federal facilities comply with were the substantive emission "standards" set

forth in the Act and other Title I provisions. The Senate bill did not require, any more than the House bill, Federal compliance with State procedures. Both the House and Senate language were changed by the Conference Committee. The new language, which was enacted by Congress, requires Federal facilities to "comply with Federal, State, interstate and local requirements respecting control and abatement of all pollution to the same extent that any person is subject to such requirements." Concerning this new language, the Conference Report states, "The House bill and the Senate amendment declare that Federal departments and agencies should comply with applicable standards of air quality and emission." H. Rept. No. 91-1783, 91st Cong., 2d sess., p. 48 (1970).

It seems apparent, therefore, that Congress at all times contemplated a self imposed policy of Federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures. If Congress had intended to abandon the well established doctrine, which has its basis in the Supremacy Clause, that the Federal Government is immune from attempts by states to subject it to state regulatory measures,[4] it would have so stated.

It must be noted, moreover that, Congress was sensitive to the issue of federal-state relations in enact-

---

4. Eg. *McCullogh v. Maryland*, 4, Wheat. 316 436 (1819); Ohio *v. Thomas*, 173 U.S. 276 (1899); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

ing the Clean Air Act and, in a number of instances, expressly stated the manner in which Federal and State authority would interact in the case of Federal facilities. Since Congress expressly granted authority to the states concerning some aspects of the Clean Air Act's impact on Federal facilities, the plaintiff's argument is, in essence, based on the contention that certain other grants of authority to the states must be implied from the phraseology of Section 118 of the Act. Such an argument flies in the face of the principle that ,where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. 2 J Sutherland, *Statutory Construction* sec. 4915 (3 ed. 1943).

Cases decided to date which support the conclusion arrived at herein include *California* v. *Stastny,* 4 ERC 1447 (C.D. Calif. 1972), appeal pending 9th Circuit, and an unreported order in *State of Alabama, et al* v. *Seeber, et al* (N.D. Ala., No. 72-939), June 5, 1973. Notice of appeal filed June 28, 1973. In *Stastny,* the court held that "[d]efendants are not required to either apply for or obtain permits from the Air Pollution Control District prior to operating or using any equipment or machines at the naval base at Long Beach, California." 4 ERC at 1448. In *Seeber,* the court dismissed a complaint which was quite similar to the one at bar.

We further note that a permit has absolutely nothing to do with air quality. The substantive requirements of the implementation plan (e.g., emission standards and compliance schedules) do, and it is those "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements respecting control and abatement of air pollution" to which section 118 of the Clean Air Act refers.

THE CLAIM AGAINST THE EPA

In its second claim for relief, the plaintiff contends that the defendant Ruckelshaus,[5] Ravan and the Environmental Protection Agency have violated Section 113 of the Clean Air Act, 42 U.S.C. sec. 1857c-8, by failing" to commence appropriate actions . . . to compel compliance with the Kentucky Plan as to permits to operate, time schedules, and emission limitations . . . " (Complaint para. 42). In paragraph 41 of the complaint, the plaintiff contends that there are "widespread violations of the Kentucky Plan, because of the inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations."

Since, as is held above, the defendants correctly construed their responsibility with respect to applying for a state permit, the plaintiff's claim against the EPA and its officers does not state a claim upon which relief

---

5. Pursuant to Rule 25(d) (1) F.R.Civ.P., Robert Fri, Acting Administrator of the EPA, has been substituted as a defendant in place of William Ruckelshaus since Mr. Ruckelshaus has resigned from his former position as Administrator of EPA.

can be granted, for it was based on the assumption that the defendants misconceived their duty with respect to applying for permits. In any event, Section 113(a) of the Clean Air Act clearly grants the Administrator discretionary authority and, consequently, the Administrator's failure to take action under Section 113(a) is unreviewable since it was agency action "committed to agency discretion by law." 5 U.S.C. sec. 701. *See eg., United States* v. *Walker,* 409 F.2d 477 (C.A. 9, 1970).

SOVEREIGN IMMUNITY

All defendants have vigorously asserted that the doctrine of sovereign immunity is a barrier to the plaintiff's suit. Since the doctrine is applicable it serves as an alternate basis for this Court's order.

Although the plaintiff listed in its complaint a number of statutes as the basis for this Court's jurisdiction in the matter,[6] the plaintiff has apparently chosen to rely upon the Clean Air Act of 1970, 42 U.S.C. Section 1857 *et seq.,* with respect to the question of waiver of sovereign immunity.[7]

---

6. The plaintiff alleges, on page one of its complaint, that "(T)his action arises under the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States of America; U.S.C. Title 42, Section 1331; U.S.C., Title 42, Section 1857, et seq.; U.S.C., Title 5, Section 702; U.S.C., Title 28, Section 2201, et seq., and U.S.C., Title 28, Section 1361."

7. The defendants argued that the statutes listed in footnote six supra, did not vest this Court with jurisdiction. In its memoranda opposing the defendants' motions to dismiss and for summary judgment, the plaintiffs relied entirely on the Clean Air Act and did not urge that this Court had jurisdiction under any of the other statutes which it had invoked in its Complaint.

The sovereign immunity argument may best be analyzed in two steps. The first consideration is whether this suit, although in form against officers and agencies of the Federal Government, is actually a suit against the sovereign. Once we determine that this suit is against the sovereign, then we must also determine whether there has been a waiver of sovereign immunity in this instance.

To determine whether this suit against officers and agencies of the Federal Government must be treated as a suit against the sovereign, this Court is required to consider whether the suit would expend itself "on the public treasury or interfere with the public administration." *Dugan* v. *Rank,* 372 U.S. 709, 620-621 (1963). For if the relief sought would interfere in a substantial way with important government functions, the suit, although nominally directed against individuals, is "a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Larson* v. *Domestic and Foreign Corporation,* 337 U.S. 782, 688 (1949).[8] In referring to

---

8. The sovereign immunity doctrine is also applicable to the Union Carbide Corporation since the Complaint herein only concerns Union Carbide's role as a contractor whose actions are subject to the direction and control of the Atomic Energy Commission. See *Varson v. Roane-Anderson Co.,* 342 U.S. 232, 236 (1952); *United States v. Boyd,* 378 U.S. 39 (1964).

BEST COPY AVAILABLE

sovereign immunity, the Sixth Circuit recently said:

> Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704, 69 S. Ct. 1457, 93 L.Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that the defendants are all named as individuals does not change the result [*Ogletree v. McNamara,* 449 F.2d 93 (C.A. 6, 1971)].

The question which this Court must address is whether this suit is barred because the relief which the plaintiff requests would interfere with basic functions of national defense and the carrying onward of congressionally authorized activities. Even Professor Davis, one of the foremost critics of the sovereign immunity doctrine, has acknowledge that:

> The most persuasive reason for sovereign immunity that has been found in reports of cases is a remark in a dissenting opinion of 1882, that "The sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion . . . " [*United States* v. *Lee,* 106 U.S. 196, 226 (1882)] Judicial interference would surely be harmful if the government were dispossed of its military bases and equipment during

> an emergency. [K. Davis, Administrative Law Text 498 (3d ed. 1972)].

This Court is persuaded that, if the plaintiff's arguments were accepted, the plaintiff could, although it disavows any intention of doing so, interfere with the execution of important Federal actions. In reaching the above conclusion, this Court has not ignored the provision, in Section 118 of the Act, that "[t]he President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ." The foregoing provision does not dispel the possibility that the plaintiff's permit powers, if applied to the defendants, might seriously interfere with important Federal functions. First, Section 118 limits the President's authority to grant an exemption to situations where the President has "requested such appropriation [for air pollution control] as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation." Moreover, the President is not empowered to grant exemptions with respect to new stationary sources. It is readily apparent, therefore, *that Section* 118 *does not grant the President sufficient authority to sweep aside all interference with vital Federal functions which may arise if the plaintiff were allowed to impose its permit power on the defendants.* The rationale supporting sovereign immunity in this case is, therefore, undiminished.

With respect to the question of whether Congress has waived the sovereign immunity of the United States, only a brief examination of the statutes relied upon by the plaintiff, with the exception of the Clean Air Act, is necessary.

28 U.S.C. Section 1331 has never been construed as a waiver of the sovereign immunity of the United States from suit. E.g., *Anderson* v. *United States,* 225 F.2d (C.A. 5, 1956); *Cotter Corporation* v. *Seaborg,* 370 F.2d 686 (C.A. 10, 1966). Moreover, the Declaratory Judgment Act, 28 U.S.C. Sections 2201, 2202, is procedural in nature and does not enlarge the jurisdiction of the district courts or waive the sovereign immunity of the United States. *E.G., White* v. *Administrator of General Services Admin.,* 343 F.2d 444 (C.A. 9, 1965); *Donnely* v. *Mazar Shrimp & Oyster Co.,* 190 F.2d 409 (C.A. 5, 1951). As has been decided on many occasions, 28 U.S.C. Section 1361 did not waive sovereign immunity since it was only intended to ease the burden of proceeding against officials formerly suable only in the District of Columbia. E.g., *Jarret* v. *Resor,* 426 F.2d 213 (C.A. 9, 1970); *Carter v. Seamans,* 411 F.2d 767 (C.A. 5, 1969). Although the plaintiff also invokes the Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, it is settled beyond doubt that constituional provisions have no effect upon the sovereign immunity from suit. *E.g., Lynch* v. *United States,* 292 U.S. 599 (1934).

The plaintiff also cites the Administrative Procedure Act, 5 U.S.C. Section 703, *et seq.* In the Sixth

Circuit, the A.P.A. is not deemed an independent grant of jurisdiction or a waiver of sovereign immunity. *Sierra Club* v. *Hickel,* 467 F.2d 1048, 1054 (C.A. 6, 1972).[9] *cert. den.* 41 U.S.L.W. 3525,

We now arrive at the critical question concerning waiver of sovereign immunity: whether Congress intended, by enacting the Clean Air Act, to waive the Federal Government's immunity from a suit attempting to compel ofifcers in charge of Federal installations to obtain state permits for equipment which discharges pollutants into the ambient air. The plaintiff contends that, by enacting Section 118 of the Clean Air Act, 42 U.S.C. sc. 1857f, Congress waived the sovereign immunity of the United States. Section 118 does not expressly waive the sovereign immunity of the Federal Government. The plaintiff has attempted to overcome the absence of express language concerning waiver by quoting from the debate on the House and Senate versions of the Clean Air Act of 1970. Putting aside the small weight which is usually given to debate on the floor in resolving questions of statutory interpretation, the debate upon which the plaintiff relies simply does not address the question of whether Congress intended that Federal installations must submit

---

9. After thoroughly reviewing the relationship of the A.P.A. to the doctrine of sovereign immunity, the Fourth Circuit also concluded that "the doctrine of sovereign immunity applies independently of the judicial review provisions of the A.P.A." *Littel v. Morton,* 445 F2d 1207, 1213 (C.A. 4, 1971).

permit applications to states which have incorporated a permit provision in their implementation plans.

In two sections of the Clean Air Act, Congress provided judicial remedies and, in so doing, waived the sovereign immunity of the United States. Section 304 and 307; 42 U.S.C. sections 1857h-2 and 1857h-5. It is axiomatic, however, that a waiver of sovereign immunity is coextensive with the remedies which Congress provided. That Congress did not provide a remedy with respect to the Government's decision that a state permit need not be obtained must be carefully noted.

For the reasons discussed above, it is obvious that Congress did not unequivocally waive the sovereign immunity of the United States from suits attempting to compel its officers to obtain permits from state agencies before discharging, from Federal facilities under their control, substances into the ambient air.

It has been settled law since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that by virtue of Article VI, clause 2 of the Constitution there is an entire absence of power on the part of the states to subject instrumentalities of the Federal government to state regulation or control. And, as said in *Mayo* v. *United States*, 319 U.S. 441 (1943):

> This freedom is inherent in sovereignty . . . where . . . Congress does not *affirmatively declare its instrumentalities or property subject to regulation* or taxation, *the inherent freedom continues* [pp. 447-48].

An intention by Congress to depart from this long settled principle *cannot be inferred or implied.* In the words of the Supreme Court, there must be a *"clear* congressional mandate." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954). "Cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). *Soriano* v. *United States*, 352 U.S. 270 (1957).

If the Congress intended such a mandate in the present situation, we must assume that it would have said so *plainly*, as it has done when it did so intend.[10]

Since the plaintiff has not shown an "unequivocal waiver" of sovereign immunity, its arguments, concerning waiver are not persuasive.

---

10. See for example, section 10 of the Federal Control Act (40 Stat. 456 (1918), which provides in pertinent part:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law . . . . Actions at law or suits in equity may be brought by and against such carriers . . . and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

See also section 304 of the Clean Air Act, 42 U.S.C. §1857h-2 (1970).

PROCEDURAL ASSERTIONS

The TVA defendants additionally raised two procedural defenses:

(1) Whether the Attorney General of Kentucky had the power to maintain this action absent the request and consent of the Kentucky Air Pollution and Control Commission, and

(2) Whether the action, which purports to be a Class Action on behalf of "all citizens, counties, political subdivisions and agencies of the Commonwealth of Kentucky," is maintainable as a Class Action.

For the benefit of our judicial superiors on appeal we wish to clearly express our reaction to the above that they might have before them laid out cold our entire reaction, thus:

As to No. (1) above. The dispute centers around the meaning of KRS 224.991, which provides in part as follows:

> (2) It shall be the duty of the Attorney General, *upon the request of the commission* . . . to bring an action for an injunction against any person . . . violating or threatening to violate any order or determination of the commission . . . .
>
> * * *
>
> (4) The authority herein vested in the Attorney General, *upon request of the commission*, to bring actions for injunctions . . . shall be exclusive.

It is undisputed that no such request has been made by the Commission, and that, in fact, TVA was engaged in discussions with the Commission concerning TVA's interpretation of Section 118 at the time this action was filed. The Attorney General admits that the General Assembly can restrict his authority to bring actions, but contends that KRS 224.991 is not such a restriction. He contends that the statute merely makes it his duty to bring actions upon the Commission's request, but does not expressly prohibit him from bringing actions without such a request. Although the matter is not free from doubt, the Court is inclined to agree, that in the circumstances of this case, the Attorney General can maintain the action without a request from the Commission.

As to the Class Action assertion, the TVA defendants maintain that this action cannot be brought as a Class Action. The Court agrees. KRS 224.991(4) provides:

> *The authority herein vested in the Attorney General . . . to bring actions for injunctions for violations* of KRS 224.310 to 224.460 or of *any regulation*, or order issued thereunder, *shall be exclusive*. Nothing herein contained shall abridge the right of any person to recover actual compensatory damages resulting from any such violation.

Such language clearly shows the intention of the Kentucky General Assembly to debar actions for *injunctive* relief from alleged violation of Commission regulations to *all* entities in Kentucky *except* the Attorney General acting on behalf of the Commission, who has "exclusive" power to seek such relief. Moreover, any duty to obtain a permit under these regulations as owed *only*

to the Commission, not to "all citizens, counties, political subdivision and agencies of the Commonwealth." There are no questions of law or fact common to the alleged class, and plaintiff is not a member of the class sought to be represented. The action is not a proper class action under Rule 23. FED.R.Civ.P.

Plaintiff seeks to justify a class action on the basis of Section 304 of the Clean Air Act, 42 U.S.C. §1857h-2, which provides in part:

> Except as provided in subsection (b) of this section, any person may commence a civil action *on his own behalf* . . . .

Not only does this statute not provide for class actions, but its legislative history expressly states that such actions are prohibited. Section 304 originated in S. 4358, 91st Cong., 2d Sess. (1970). The Senate Committee Report on that section states:

> *Section 304 does not authorize a "class action."* Instead, it would authorize a private action by any citizen or citizens acting *in their own behalf.* [S.Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970)].

This section pertaining to citizen suits was adopted by the Conference Committee and was enacted into law as Section 304 of the Clean Air Act. Accordingly, this action cannot be maintained as a class action under either Rule 23 or the Clean Air Act.

Accordingly, the Court is of the opinion that all motions of all defendants for summary judgment are due to

be denied. A separate judgment to such effect will be entered herwith.

SO ORDERED.

August 10, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Rendered: 8-13-73

Entered: 8-13-73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY.
Ex Rel ED W. HANCOCK,
Attorney General, Plaintiff

v. Civil Action No. 7480-G

ROBERT FRI,
Acting Administrator,
Environmental Protection Agency,
et al, Defendants

JUDGMENT

It is ordered and adjudged that the motion of plaintiff for summary judgment be and same is OVERRULED, and the motions of all defendants for summary judgment herein be and the same are hereby SUSTAINED; and this action is, accordingly, dismissed at the plaintiff's costs.

August 13, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Filed Sept. 9, 1973

[Title Omitted in Printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, plaintiff herein, hereby APPEALS to the United States Court of Appeals for the Sixth Circuit from the Order of this Court entered on the 11th day of July, 1973, and the Judgment of this Court entered on the 13th day of August, 1973, wherein the Motion for Summary Judgment on behalf of all defendants, except Tennessee Valley Authority and its officials, and the Motion for Summary Judgment on behalf of Tennessee Valley Authority and its officials were sustained.

NOTICE

Please take Notice that the foregoing NOTICE OF APPEAL will be mailed to the Clerk of the Court for filing on the 6th day of September, 1973, to be considered at the convenience of the Court.

ED W. HANCOCK
ATTORNEY GENERAL

/s/ David C. Short
By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL

/s/ David D. Beals
By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
309 Shelby Street, Room 111
Frankfort, Kentucky 40601
(Telephone: (502) 564-3595)
COUNSEL FOR PLAINTIFF

[Certificate of Service Omitted in Printing]

Filed 12/7/73

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, Ex Rel
ED. W. HANCOCK,
Attorney General, Plaintiff-Appellant,

VS:- MOTION TO DEFER FILING OF
APPENDIX TO DECEMBER 12, 1973
No. 73-2099

RUSSELL E. TRAIN, Administrator,
Environmental Protection Agency, et al,
Defendants-Appellees.

COMES the appellant, by Counsel, and states to this Honorable Court that it will be mechanically impossibe for Appellant to file the Appendix in this action on December 10, 1973, but that the Appendix will be completed and ready for filing on December 12, 1973, at which time Briefs will also be served in final form.

Appellant, therefore, moves this Honorable Court to permit said deferred filing of the Appendix for the reasons above-stated and submits the attached letter in support thereof.

Final Extension To 12/17/73 Granted
Entered By The Clerk Pursuant To Rule 4(F)
Sixth Cir. Rules.
James A. Higgins, Clerk

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

/s/ David C. Short
By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW
COMMONWEALTH OF KENTUCKY

/s/ David D. Beals
By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW
COUNSEL FOR APPELLANT

[Certificate of Service Omitted in Printing]

Filed 3/5/74

[Title Omitted in Printing]

MOTION TO FILE AMICUS BRIEF OUT OF TIME

TO THE HONORABLE COURT OF APPEALS:

COMES NOW the State of Texas by and through John L. Hill, Attorney General of Texas, and files this its Motion for Leave to File an Amicus Brief in support of Appellant Commonwealth of Kentucky and would show the Court the following:

1. Rule 29 of the Federal Rules of Appellate Procedure provides that a state need not secure consent of the parties or leave of Court to file an amicus brief, but that any such brief must be filed within the time allowed the party whose position as to affirmance or reversal such brief will support. However, the State of Texas is seeking to file its Brief out of time as it did not learn of the appeal of the instant case in time to permit preparation of its Brief by the date upon which the Commonwealth of Kentucky filed its Brief.

Motion Granted 3-18-74

2. The State of Texas believes the importance of this case requires that all the issues be thoroughly analyzed and that the Court would be well served by an amicus brief from the State of Texas, even though filed out of time.

3. The undersigned attorney respectfully requests that he be allowed to appear on behalf of the State of Texas *pro hac vice*. Said attorney is not now a member of the Bar of the Sixth Circuit Court of Appeals, but has requested the Clerk to forward such forms as are necessary for application.

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Honorable Court grant it leave to file an amicus brief out of time in support of the Commonwealth of Kentucky, and that it allow the undersigned attorney to appear on behalf of the State of Texas *pro hac vice*.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

/s/ .....
PHILLIP K. MAXWELL
Assistant Attorney General

Attorneys for the State of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4143

[Certificate of Service Omitted in Printing]

Decided 6/5/74
Filed 6/5/74

No. 73-2099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY
Ex Rel., ED HANCOCK, Attorney
General, Plaintiff-Appellant,

v.

WILLIAM D. RUCKELSHAUS, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky

Decided and Filed June 5, 1974.

Before: Weick and Lively, Circuit Judges; and Cecil, Senior Circuit Judge.

Lively, Circuit Judge. This case is concerned with the Clean Air Act Amendments of 1970 (the Act), and more particularly with the meaning of section 118 there-

of, 84 Stat. 1689, 42 U.S.C. § 1857.[1] The Attorney General of Kentucky brought this action against various federal departments and agencies which operate facilities within the State that employ pollutant emitting quipment. Included among the defendants were the Secretary of the Army and various Army officers, the chairman of

---

1. Section 118 provides:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

the Board of Directors of the Atomic Energy Commission (AEC) and various officials of that agency and the managing officers of the Tennessee Valley Authority (TVA). The complaint recited that a "Kentucky Plan" for implementation of air quality standards had been adopted, and approved by the Environmental Protection Agency (EPA), and that the plan included a regulation which requires the owners and operators of air pollutant emitting equipment to apply for and obtain from the Kentucky Air Pollution Control Commission (Commission) "a permit to operate their air contaminant equipment."[2] Stating that the defendants had refused to apply for and obtain such permits, the plaintiff asked for an order directing them to do so and that they be permanently restrained from refusing to comply with the provisions of section 118 of the Act.

Also named defendants were the Administrators of EPA and the regional administrator whose responsibility includes Kentucky. It was complained that these defendants had refused to initiate appropriate actions against the previously named defendants to require their compliance with the permit requirements of the Kentucky

---

2. Administrative Regulation NO. AP-1, §5 provides:

(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

Plan. It was alleged that section 113 of the Act[3] requires the EPA administrators to proceed in the manner requested. The relief sought against these dfndants was entry of an order directing them to commence an action under section 113 to obtain full compliance by the other

---

3. Section 113 (42 U.S.C. §1857c-8) provides, in part, as follows:

> (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.
>
> (2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—
>
> (A) by issuing an order to comply with such rement, or

defendants with the permit requirement. In addition, a declaratory judgment was sought to the effect that the defendant operators of federal facilities do not have the right to refuse to comply with the permit regulations of the Kentucky Plan and that the EPA defendants, with knowledge of widespread violations by the other federal defendants, do not have a right to fail to initiate appropriate action under section 113.

All defendants filed motions to dismiss or for summary judgment. The plaintiff also filed a motion for summary judgment and various parties filed affidavits in support of their motions. Although plaintiff did not concede that all the federal facilities in Kentucky are in compliance with air pollution emission standards or have adopted schedules which will bring them into compliance, the district court determined that resolution of this issue was not required for decision of the case. Upon consideration of the cross-motions, District Judge James E.

> (B) by bringing a civil action under subsection (b) of this section.
>
> The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—
>
> (1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or
>
> (2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a) (1) of this section of a finding that such person is violating such requirement;

Gordon granted summary judgment to the defendants and dismissed the action.

The issues on appeal are narrow. In the first place, the appellant contends that section 118 of the Act "requires that those persons in charge of the administration and operation of air contaminant sources owned or operated by the federal government comply with all state requirements respecting the control and abatement of air pollution including Kentucky's permit requirements." The appellees maintain that section 118 requires compliance with substantive provisions of the Kentucky Plan, but does not compel federal officials to obtain state or local permits for the operaiton of federal facilities. It is the position of the appellant that the permit, requirement is substantive in nature because the Kentucky Plan is so formulated that the State cannot meet its primary responsibility under the Clean Air Act without the use of permits. To this the appellees respond that they are willing to supply, and in fact have supplied, the information sought on the permit application form, but will not seek the permit itself.

It is agreed by the parties that section 304 of the Act[4] provides a means by which the United States may

4. Section 304 (42 U.S.C. § 1857h-2) provides in pertinent part:

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

Definition

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

be sued for violation of an emission standard of limitation, or order with respect thereto. The appellant argues that this provision only permits abatement actions and that the Commission needs to be able to prevent air pollution as well as abate violations. It is maintained that the permit device is the only means by which the State can exercise preventive control over polluters. The language of section 304 does not require that suit be deferred until an actual violation of an established emission standard occurs. Sub-section (f) (1) clearly permits the filing of an action for violation of a schedule or timetable of compliance. Thus, it is not necessary under section 304, that the State or other aggrieved party wait until an emission standard is violated to bring suit. It may be done at the first instance where the owner or operator of polluting equipment fails to meet a level prescribed in a schedule or timetable of

compliance. Such an action would surely be preventive in nature.

Both the doctrine of sovereign immunity and the application of the Supremacy Clause of the Constitution are involved in the decision of this case. We view the action against the non-TVA defendants as a suit against the United States. The sovereign can only act through its agents. and the relief sought in this case does not seek to impose personal liability of the named defendants, but rather would affect public administration *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688-689 (1949); *Land v. Dollar*, 330 U.S. 731, 738 (1947). Every declaration of a waiver of sovereign immunity must be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Section 118 contains no waiver and that included in section 304 does not permit suit to require owners and operators of federal facilities to obtain permits from a state agency in order to continue to operate. The two sections are part of the same Act and must be read together. By failing to include a separate waiver of immunity in section 118 Congress indicated that compliance with its provisions may be compelled by suit only to the extent permitted by section 304. This section provides ample means for enforcement of air quality and emission standards.

The TVA defendants do not claim sovereign immunity from suit, but do maintain that the Supremacy Clause of the United States Constitution exempts federal agencies and officials in the performance of their

duties from state and local regulations. From the time of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this has been a settled principle of our federalism. See *Mayo* v. *United States*, 319 U.S. 441, 445-448 (1943). The doctrine has been held applicable to TVA. *Posey* v. *Tennessee Valley Authority*, 93 F.2d 726, 727 (5th Cir. 1937). The appellant argues that Congress determined in this instance to submit federally owned and operated facilities to state regulation by providing, in section 118, that agencies of the federal government "shall comply" with state requirements. This does not necessarily follow. An examination of the legislative history of the 1970 Act reveals no congressional intent to subject federal instrumentalities and agencies to state administrative regulations. Separate House and Senate bills were interpreted in the respective Reports as requiring federal agncies to comply with applicable "emission standards" and the Joint Conference Report stated that the House bill and Senate amendment which became section 118 "declared that Federal departments and agencies should comply with applicable standards of air quality and emissions." This language appears to us to refer only to substantive requirements and not to encompass the Kentucky regulation which requires permits. In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.

The plaintiff also relies on Executive Order No.

11507 which was issued on February 4, 1970 as authority for the proposition that the federal agencies and instrumentalities sued here are required to obtain Kentucky permits. This Executive Order, while in force, was never so construed by the Environmental Protection Agency, as shown by documents filed in connection with the motions for summary judgment. Such administrative construction is entitled to great weight particularly when it is supported by the legislative history of the Act to which the Order refers. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). Furthermore, the order in question was superseded by Executive Order No. 11752 on December 17, 1973 which contains this policy statement:

> SECTION 1. *Policy.* It is the purpose of this order to assure that the Federal Government, in the design, construction, management, operation, and maintenance of its facilities, shall provide leadership in the nationwide effort to protect and enhance the quality of our air, water, and land resources through compliance with applicable standards for the prevention, control, and abatement of environmental pollution in full cooperation with State and Local governments. Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control.

We find no support in the language of Executive Order No. 11507 for an interpretaiton of section 118 in accord with plaintiff's contention, and such an interpretation is clearly negatived by the quoted portion of Executive Order No. 11752.

There has been a congressional waiver of immunity with respect to one group of defendants in this action, the EPA administrators. Section 304(a)(2) of the Act (42 U.S.C. § 1857h-2(a)(2)) provides for an action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The question here is whether the act or duty which the plaintiff sought to have the court order the EPA defendants to perform is mandatory or discretionary. This requires a consideration of the language of section 113 of the Act since the complaint demands that these defendants be "[o]rdered to commence appropriate action under Section 113" to obtain full compliance with the Kentucky Plan. A reading of section 113(a)(1) reveals that that Administrator *shall* give notice to persons in violation of hte plan, but that he *may* thereafter issue an order or bring

an action under subsection (b). The same language is used in section 113(a)(2), which deals with widespread violations of an implementation plan. Again, the Administrator is required to give public notice of his finding, but *may* enforce any requirement of the plan by issuing an order or commencing an action under sub-section (b). Section 113(b) uses only the discretionary "may"; the mandatory "shall" does not appear. The district court correctly held that it had no power to review the decision of EPA not to commence actions under scetion 113 since this was a decision on "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

A review of the Act as a whole supports the views set forth in this opinion. Congress clearly intended that federal facilities comply with the emission standards and limitatons of the state plan where they are located. Such compliance is mandated by section 118 and made enforceable by legal action pursuant to section 304. By defining the term "emission standard or limitation" broadly in section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation. The chief purpose of the Act are "to protect and enhance the quality of the Nation's air resources" (§ 101(b)(1)) and rapidly bring into being "a program to achieve the prevention and control of air pollution." (§ 101(b)(2)). We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit

requirements. Congress did commit the United States to compliance with air qaulity and emission standards and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end. The national dedication to improvement of the environment by prevention and control of air pollution is in no way impeded by exempting federal agencies from the permit requirement of Administrative Regulation No. AP-1, § 5.

The judgment of the District Court is affirmed.

OFFICE OF THE CLERK
JOHN P. HEHMAN
Clerk

* * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

June 5, 1974

Mr. Ed W. Hancock
Mr. David C. Short
Mr. David D. Beals
Mr. Wallace H. Johnson
Mr. George J. Long
Mr. G. Wilson Horde
Mr. Robert H. Marquis
Mr. Andrew P. Miller
Mr. John L. Hill
Mr. Robert F. Trevey
Mr. Evelle J. Younger

Re: Commonwealth of Kentucky, ex rel., Ed W. Hancock, Attorney General, Plaintiff-Appellant,

vs.

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.
Case No. 73-2099

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

John P. Hehman, Clerk
/s/Grace Keller
Chief Deputy

Enclosure

73-2099

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202
JAMES A. HIGGINS, CLERK

IMPORTANT NOTICE

March 11, 1974
Filed 3/11/74

Mr. Ed W. Hancock, Attorney General
Messrs. Short & Beals
Mr. Robert F. Trevey
Messrs. Johnson, Gelin & Klarquist
Mr. George J. Long
Mr. G. Wilson Horde
Messrs. Marquis & Sanger
Messrs. Miller & Steger

Re:
[Title Omitted in Printing]

The above-styled case is set for oral argument on MONDAY, APRIL 8, 1974 in the Court Room of the United States Court of Appeals, U. S. Post Office and Courthouse, Fifth and Walnut Streets, Cincinnati, Ohio.

Please report to the Clerk's Office Room 608, by 8:45 A. M. The Court convenes at 9:00 A. M., Eastern Daylight Time.

JAMES A. HIGGINS
Clerk

Entered 6/5/74

Filed June 5, 1974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 73-2099

COMMONWEALTH OF KENTUCKY,
EX REL., ED W. HANCOCK,
ATTORNEY GENERAL ——Plaintiff-Appellant,

vs.

WILLIAM D. RUCKELSHAUS,
ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION
AGENCY, ET AL., ——.Defendants-Appellees.

Before: WEICK and LIVELY, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT
/s/John P. Hehman
Clerk

A True Copy.
Issued as Mandate 7/11/74

COSTS: Awarded to Appellees
Filing fee ——$——
Printing T.V.A. Brief $71.29
Total ——$71.29

Attest:
/s/John P. Hehman
John P. Hehman, Clerk

SUPREME COURT OF THE UNITED STATES
No. 74-220

Ed W. Hancock, Attorney General of
Kentucky, ... Petitioner,

v.

Russell E. Train, Administrator,
Environmental Protection Agency, et al.

Order Allowing Certiorari. Filed March 17, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein APPENDIX was filed with the Brief for appellant Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, in the office of the Clerk of the United States Supreme Court and served by mailing true copies hereof to: Honorable William B. Saxbe, Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Robert H. Bork, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Robert H. Marquis, General Counsel, Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Honorable Beauchamp E. Brogan, Associate General Counsel, and Honorable Justin M. Schwamm, Assistant General Counsel, Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee, 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richomnd, Virginia, 23219; Honorable Evelle Younger, Attorney General State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Foster Knight, Deputy Attorney General, Honorable Roderick Walston, Deputy Attorney General, Honorable Robert H. O'Brien, Assistant Attorney General, and Hon-

orable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 Honorable John L. Hill, Attorney General, State of Texas, Post Office Box 12548, Austin, Texas, 78711; Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas 78711; Honorable James F. Gordon, Judge, United States District Court For the Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Lester L. Cecil, Senior Circuit Judge, Honorable Pierce Lively, Circuit Judge, and Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio; and further it is hereby certified that all parties required to be served in this action have been served, all this the 29 day of April, 1975.

David D. Beals

David D. Beals
Assistant Attorney General
Commonwealth of Kentucky

Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

No. 74-220

In the Supreme Court of the United States

OCTOBER TERM, 1974

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

---

1. Petitioner, Commonwealth of Kentucky, seeks review of the judgment of the United States Court of Appeals for the Sixth Circuit in this case. That judgment holds that Section 118 of the Clean Air Act of 1970, 84 Stat. 1678, 1689, as renumbered and amended, 42 U.S.C. 1857f, does not require federal officers to obtain emission control permits from the Kentucky Air Pollution Control Commission as a prerequisite to operating federal facilities in Kentucky.

The relevant facts and issues are accurately stated in the opinions of the district court (Pet. App. A) and the court of appeals (Pet. App. B) and may be summarized as follows: Kentucky filed suit in the United States

District Court for the Western District of Kentucky seeking declaratory and injunctive relief against certain officers of the United States responsible for operating various federal installations within Kentucky. The complaint alleged that a Kentucky air pollution regulation required all operators of potential air emission sources to obtain permits from the Kentucky Air Pollution Control Commission, that Section 118 of the Clean Air Act of 1970 made this requirement applicable to the federal defendants, and that the federal defendants had neither applied for nor obtained such permits.

After submission of the case on cross-motions for summary judgment, the district court held in favor of respondents. On appeal, the court of appeals affirmed. It held that Section 118 of the Clean Air Act of 1970 requires substantive compliance by non-exempt federal facilities with state clean air standards but does not subject federal facilities to state permit requirements. The court also compared Section 118 to Section 304(a) permitting citizens' suits against the United States and concluded that the state's suit against the United States was also barred by sovereign immunity and the Supremacy Clause of the Constitution (Pet. App. B 33a-34a).

2. In our view the decision of the Sixth Circuit is correct. However, in an essentially similar suit, the United States Court of Appeals for the Fifth Circuit, in *State of Alabama* v. *Seeber*, 502 F. 2d 1238, has subsequently held that federal installations are indeed subject to state permit requirements and has expressly disagreed with both aspects of the Sixth Circuit's holding in the present case.[1] The federal parties in that case are filing

[1]The same basic issue is presently pending in *California* v. *Stastny*, No. 72-2905, C.A. 9, appeal docketed November 6, 1972; *Illinois* v. *Department of Defense*, N.D. Ill., Civ. No. 74-C-3122 (Joliet Arsenal air case); *United States* v. *Pennsylvania Environmental Hearing Board*, M.D. Pa., Civ. No. 73-454; and *Chattanooga-Hamilton County Air Pollution Control Board* v. *ICI-Atlas*, E.D. Tenn., Civ. No. 6581 (Volunteer Arsenal air case).

a petition for a writ of certiorari seeking review of that decision.[2] We accordingly do not oppose the granting of the petition for a writ of certiorari in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

[2]We are furnishing a copy of our petition in that case to the petitioner here.

Supreme Court, U. S.
FILED
APR 30 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK, ATTORNEY GENERAL .... PETITIONER

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL ..... RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

ED W. HANCOCK
Attorney General
Commonwealth of Kentucky
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

DAVID D. BEALS
Assistant Attorney General
Commonwealth of Kentucky
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

DAVID C. SHORT
Assistant Attorney General
Commonwealth of Kentucky
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

Petition for Certiorari Filed September 3, 1974
Certiorari Granted March 17, 1975

TABLE OF CONTENTS

Page

INDEX TO CITATIONS iv

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

I

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF SECTION 118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f., AND A REQUIREMENT NECESSARY TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED? 2-3

II

DOES THE RULING OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT ARE SUBJECT ONLY TO ACTIONS UNDER SECTION 304 OF THE CLEAN AIR AMENDMENTS OF 1970, 42 U.S.C. §1857h-2, PRESENT A SIGNIFICANT HINDRANCE TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED? 3

TABLE OF CONTENTS (Continued)

Page

III
DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2? 3

STATUTORY PROVISIONS INVOLVED 3-11

STATEMENT OF THE CASE 11-15

SUMMARY OF ARGUMENTS 16-18

ARGUMENT I
THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF SECTION 118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857*f*., AND A REQUIREMENT NECESSARY TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED 18-39

TABLE OF CONTENTS (Continued)

Page

ARGUMENT II
THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FINDING THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT ARE SUBJECT ONLY TO ACTIONS UNDER SECTION 304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2, AND THIS RULING PRESENTS A SIGNIFICANT HINDRANCE TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED 39-48

ARGUMENT III
THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2 48-61

CONCLUSION 61-63

CERTIFICATE OF SERVICE: 64-66

INDEX TO CITATIONS

CASES: Page

Baltimore National Bank v. *State Tax Commission,*
297 U. S. 209 (1936) 54

Caminette v. *U. S.,*
242 U.S. 470 (1917) 19

Carter v. *Seamons,*
411 F.2d. 767, 771 (5 CA, 1969),
cert. den. 397 U.S. 941 (1970) 59, 60

County of Milwaukee v. *Veteran's Administration,*
5 ERC 1412 (ED. Wisc., May 7, 1973) 60, 61

Dugan v. *Rank,*.....
372 U.S. 609 (1963) 59

Ex Parte Collett,
337 U.S. 55, 69 S.Ct. 944,
93 L.Ed 1207 (1949) 36

Florida Lime & Avocado Growers, Inc v. *Paul,*
373 U.S. 132 (1963) 58

Gemsco, Inc. v. *Walling,*
324 U.S. 244, 260, 89 L.Ed. 921,
933 (1945) 36

Getty Oil Co. (Eastern Operations) v *Ruckelshaus,*
342 F.Supp. 1006, 1017, (Dist. Dela., 1972),
modified 467 F.2d. 349 (3rd. Cir., 1972),
cert. den. 409 U.S. 1125 (973) 55, 56

Helvring v. *Hammel,*
311 U.S. 504 (1941) 27

INDEX TO CITATIONS (Continued)

CASES: Page

Hines v. *Davidowitz,*
312 U.S. 52 (1941) 57, 58

Larson v. *Domestic & Foreign Commerce Corporation,*
337 U.S. 682, 689, 93 L.Ed. 1628, 1635,
1636 (1949) 59

Malone v. *Bowdoin,*
369 U.S. 643 (1962) 59

Mayo v. *U. S.,*
319 U.S. 441, 446, 63 S.Ct 1137, 1140,
87 L.Ed. 1504, 1508 (1943) 49

Nash v. *Forida Industrial Comm.,*
389 U.S. 235 (1967) 58

Perez v. *Campbell,*
402 U.S. 637, 649 (1971) 57, 58

Sears, Roebuck & Co., v. *Stiffel Co.,*
376 U.S. 224 (1964) 58

62 Cases, More or Less, Each Containing 6 Jars of Jam v. *U.S.,*
340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566
(1951) 32

State of Alabama v. *Seeber,*
502 F.2d. 1238, 1243, 1244, 1245, 1246, 1247,
1248 (1974), ...22-26, 33, 34, 36-38, 47, 50-52, 61

State of California v. *EPA,*
7 ERC 1667, 1671, 1672, 1673 (9 CA.,
February 13, 1975) 52, 53

BEST COPY AVAILABLE

INDEX TO CITATIONS (Continued)

CASES: Page

State of Washington v. *Udall*,
417 F.2d. 1310 (9 CA, 1969) 59

Train v. *Natural Resources Defense Council*,
43 U.S. L.W. 4467, 4467 (U.S., April 16, 1975) .. 29

U. S. v. *Katz*,
271 U.S. 354 (1926) 27

Washington Market Co. v. *Hoffman*,
101 U.S. 112, 115, 116, 25 L.Ed. 782 (1879) 26

STATUTES: Page

Clean Air Act Amendments of 1970
Title 42, Section 1857. et seq., U.S.C.

Section 101(a), Clean Air Act Amendments of 1970
Title 42, Section 1857(a), U.S.C. 28, 35

Section 101(b), Clean Air Act Amendments of 1970..
Title 42, Section 1857(b), U.S.C. 27

Section 107, Clean Air Act Amendments of 1970
Title 42, Section 1857c-2, U.S.C. ..... 28 ,29

Section 109, Clean Air Act Amendments of 1970
Title 42, Section 1857c-4, U.S.C. 29

Section 110. Clean Air Act Amendments of 1970
Title 42, Section 1857c-5, U.S.C. 29, 38, 39, 54, 55, 62

Section 110(a), Clean Air Act Amendments of 1970
Title 42, Section 1857c-5(a) 29, 30

INDEX TO CITATIONS (Continued)

STATUTES: Page

Section 111(c)(1), Clean Air Act Amendments of 1970
Title 42, Section 1857c-6(c)(1), U.S.C. 31

Section 112(d)(1), Clean Air Act Amendments of 1970
Title 42, Section 1857c-7(d)(1), U.S.C. 31

Section 113, Clean Air Act Amendments of 1970
Title 42, Section 1857c-8, U.S.C. 4, 56, 57

Section 114(b)(1), Clean Air Act Amendments of 1970
Title 42, Section 1857c-9(b)(1), U.S.C. 32

Section 116, Clean Air Act Amendments of 1970
Title 42, Section 1857d-1, U.S.C. 24, 26

Section 118, Clean Air Act Amendments of 1970
Title 42, Section 1857f., U.S.C. ..18-20, 23, 24, 26,
31-36, 38-40, 42, 49, 50, 54, 55, 59, 61

Section 209, Clean Air Act Amendments of 1970
Title 42, Section 1857f-6a, U.S.C. 32

Section 304, Clean Air Act Amendments of 1970
Title 42, Section 1857h-1, U.S.C. ..40-43, 45-47, 62

Federal Water Pollution Control Act of 1972
Title 33, Section 1251 et seq., U.S.C. 52

Section 313, Federal Water Pollution Control Act of 1972
Title 33, Section 1323, U.S.C. 52, 53, 54

Section 402, Federal Water Pollution Control Act of 1972
Title 33, Section 1342, U.S.C. 53, 54

INDEX TO CITATIONS (Continued)

OTHER REFERENCES: Page

Davis, *Administrative Law Treatise,* Volume 3, 27.03 ..60

40 C.F.R., Section 51.11(a)(5) 22

Congressional Record, Volume 116, Part 24, Page 33117 43

Congressional Record, Volume 116, Part 24, Page 33103 ..... 43, 44

Congressional Record, Volume 116, Part 24, Page 32919 44

Congressional Record, Volume 116, Part 24, Page 32927 44

36 Federal Register 158, (August 14, 1971) 22

37 Federal Register 10842, (May 31, 1972) 49

37 Federal Register 10846 ,(May 31, 1972) 56

39 Federal Register 10277, (March 19, 1974) 49

39 Fedreal Register 29357, (August 15, 1974) 49, 55

H.R. 17255, 91st. Congress, 2d. Session, Sec. 111 (1970) 35

Kentucky Air Pollution Control Commission, Administrative Regulation AP-1, Section 5; Kentucky Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards, Chapter 7 .....20, 21, 38

2 J. Sutherland, *Statutory Construction,* Section 4915 (3 Ed. 1943) 31

The Air Quality Acts of 1967, Sec. 111, P.L. 90-148 ... 34

S. 4358, 91st. Congress, 2d. Session, Sec. 118 (1970) .. 35

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL ED W. HANCOCK, ATTORNEY GENERAL .... PETITIONER

VS:

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL ..... RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

OPINIONS BELOW

The Opinion of the United States Court of Appeals For the Sixth Circuit is reported at 497 F.2d. 1172 (1974) and appears in the Appendix, pp. 157. The Opinion of the United States District Court For the Western District of Kentucky is reported at 362 F.Supp. 360 (1973) and appears in the Appendix, pp. 129.

JURISDICTION

The judgment of the United States Court of Appeals For the Sixth Circuit was entered on June 5, 1974, and appears in the Appendix, pp. 157. The Petition For Writ of Certiorari was filed less than ninety days from the date aforesaid and docketed on September 3, 1974. The Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit was issued on March 17, 1975, and appears in the Appendix, p. 174. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The jurisdiction of the District Court was invoked because the question arose under the Clean Air Act, as amended, 42 U.S.C. §1857, et seq., a Federal statute relating to the environment. The questions with respect to this statute presented in this BRIEF FOR PETITIONER are as follows:

QUESTION I

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF SECTION 118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f., AND A

REQUIREMENT NECESSARY TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED?

QUESTION II

DOES THE RULING OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT ARE SUBJECT ONLY TO ACTIONS UNDER SECTION 304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2, PRESENT A SIGNIFICANT HINDRANCE TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALTIY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED?

QUESTION III

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2?

STATUTORY PROVISIONS INVOLVED

This case involves Article VI, Clause 2, of the Constitution of the United States of America; Section 110 of the Clean Air Act Amendments of 1970, 84 Stat. 1680,

42 U.S.C. §1857c-5; Section 118 of the Clean Air Act Amendments of 1970, 84 Stat. 1689, 42 U.S.C. §1857f; and Section 304 of the Clean Air Act Amendments of 1970, 84 Stat. 1706, 42 U.S.C. §1857h-2, which are reprinted below. Also involved are Section 101, Section 107, Section 113, and Section 116 of the Clean Air Act Amendments of 1970; 81 Stat. 485, 84 Stat. 1678, 85 Stat. 464, 84 Stat. 1689; 42 U.S.C. §1857, §1857c-2, §1857c-8, §1857d-1; and Kentucky Administrative Regulation AP-1, Section 5, also promulgated in Chapter 7 of Kentucky's Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards. These are reprinted in pertinent part in Appendix C, page 36a, of the Petition For Writ of Certiorari filed in this Court.

Constitution of the United States, Article VI, Clause 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5, in pertinent part:

IMPLEMENTATION PLANS

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a

national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard; and (ii) in the case of a plan implementing a national secondary ambient air quality standard,

it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region wil not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation pian, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and

amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonabe notice and public hearings.

Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f.:

CONTROL OF POLLUTION FROM FEDERAL FACILITIES

Sec. 118. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2:

CITIZEN SUITS

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced —

(1) under subsection (a) (1)

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the

BEST COPY AVAILABLE

United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c) (1) (B) or an order issued by the Administrator pursuant to section 113 (a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under

any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term emission standard or limitation under this Act' means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

STATEMENT OF THE CASE

This action arises on Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit to review the Order of that Court affirming the Judgment of the United States District Court For the Western District of Kentucky entered against plaintiff-petitioner and in favor of defendants-respondents (Appendix, p. 129 and Appendix, p. 157) on the issue of whether Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. requires that Federal facilities operating or controlling air contaminant sources in the Commonwealth of Kentucky must comply with Section 5 of the Kentucky Air Pollution Control Commission Administrative Regulation AP-1 by applying for and obtaining permits from the Kentucky Air Pollution Control Commission.

Plaintiff in the District Court and appellant in the

Court of Appeals For the Sixth Circuit was the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General.

Defendants in the District Court were William D. Ruckelshaus,[1] Administrator, Environmental Protection Agency, when this action was fied; Jack E. Ravan, Regional Administrator, Environmental Protection Agency, Region IV; the Environmental Protection Agency, (all of which are hereinafter referred to as EPA); General Creighton Abrams, Chief of Staff, United States Army; Robert E. Froehlke, Secretary, Department of the Army; Major General W. R. Desbory, Commanding General, United States Army Armor Center and Fort Knox; Major General John Cushman, Commanding General, 101st Airborne Division, (Airmobile), and Fort Campbell; the Department of the Army, (all of which are hereinafter referred to as Army); Aubrey J. Wagner, Chairman, Board of Directors, Tennessee Valley Authority; Lynn Seeber, General Manager, Tennessee Valley Authority; J. L. McPherson, Superintendent, Shawnee Power Plant, Tennessee Valley Authority; T. E. Cavaniss, Superintendent, Paradise Power Plant, Tennessee Valley Authority; the Tennessee Valley Authority, (all of which are hereinafter referred to as TVA); James R. Schlesinger, Chairman, Board of Directors, Atomic Energy Commission; Robert

---

[1] Pursuant to Rule 25(d) (1) of the Federal Rules of Appellate Procedure, Russell E. Train was substituted in the Sixth Circuit as a party defendant-appellee in place of William D. Ruckelshaus who has resigned from his position as Administrator of Environmental Protection Agency.

E. Hollingsworth, General Manager, Atomic Energy Commission; B. W. Stiller, Manager, Paducah Gaseous Diffusion Plant, Atomic Energy Commission; the Atomic Energy Commission, (all of which are hereinafter referred to as AEC); and the Union Carbide Corporation.

This action arises out of (1) the refusal of the TVA, the Army, AEC, and Union Carbide Corporation to apply for and obtain for equipment or installations which they are presently operating in the Commonwealth of Kentucky permits from the Kentucky Air Pollution Control Commission,[2] as required in Chapter 7 of Kentucky Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards, (hereinafter referred to as the "Kentucky Plan" or the "Kentucky Implementation Plan"), and (2) the refusal of EPA to commence appropriate action against TVA, the Army, AEC and Union Carbide Corporation upon their refusal to apply for and obtain permits from the Kentucky Air Pollution Control Commission as required by the Kentucky Plan.

As a result of these refusals, the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, filed suit in the District Court on November 16, 1972, asking the Court for declaratory and injunctive relief (1) requiring TVA, the Army, AEC, and Union Carbide Corporation to apply for and obtain permits from the Kentucky Air Pollution Control Commission, (2) restraining the defendants from refusing to comply with the provisions of Sec-

---

[2] Now the Kentucky Department For Natural Resources and Environmental Protection.

tion 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., and (3) requiring EPA to commence appropriate action against TVA, the Army, AEC, and Union Carbide Corporation. (Appendix, p. 1).

The claim against TVA, the Army, AEC, and Union Carbide Corporation was based upon 42 U.S.C. §1857f. which provides that Federal facilities "shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," and Section 5 of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission as promulgated in Chapter 7 of the Kentucky Plan pursuant to Section 107 and Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 c-2 and 42 U.S.C. §1857c-5, respectively, which requires, generally, that before any piece of equipment which might result in the emission of air contaminants into the atmosphere can be constructed, modified, or operated within the Commonwealth of Kentucky, the person or agency involved must apply for and obtain air pollution control permits from the Kentucky Air Pollution Control Commission (Administrative Regulation AP-1, Section 5, is reproduced in Appendix C, page 46a, of the Petition For Writ of Certiorari filed in this Court on September 3, 1974). The claim against EPA was based on 42 U.S.C. §1857c-8. (42 U.S.C. §1857c-8 is reproduced in pertinent part in Appendix C, page 41a, of the Petition For Writ of Certiorari filed in this Court on September 3, 1974).

On July 11, 1973, the District Court entered an Order sustaining (1) a Motion For Summary Judgment filed March 16, 1973, on behalf of all defendants except TVA

and its officials, (Appendix, p. 86), and (2) a Motion For Summary Judgment filed March 5, 1973, on behalf of TVA and its officials, (Appendix, p. 63), and overruling a Motion For Summary Judgment filed March 27, 1973, on behalf of the Commonwealth, plaintiff-petitioner, (Appendix, p. 115). The Order of the District Court also directed defendants, respondents herein, to prepare and tender a Memorandum Opinion reflecting the Court's expressed legal views. (Order of District Court, Appendix p. 127).

On August 13, 1973, the District Court entered a Memorandum and Order and Judgment sustaining the Motions of TVA, EPA, the Army, AEC, and Union Carbide Corporation for Summary Judgment and overruling the Motion of the Commonwealth of Kentucky for Summary Judgment. (Appendix, p. 129).

On September 9, 1973, the Commonwealth of Kentucky filed a Notice of Appeal from the Order of the District Court entered on the 11th day of July, 1973, and the Judgment of said Court entered on the 13th day of August, 1973, wherein the Motions for Summary Judgment on behalf of TVA, EPA, the Army, AEC, and Union Carbide Corporation had been sustained. (Appendix, p. 151.)

On June 5, 1974, the Court of Appeals For the Sixth Circuit entered its Opinion affirming the Judgment of the District Court. (Appendix, p. 157).

On September 4, 1974, the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, filed its Petition For Writ of Certiorari and on March 17, 1975, this Court issued a Writ of Certiorari to the Court of Appeals For the Sixth Circuit. (Appendix, p. 174).

SUMMARY OF ARGUMENTS

I. Examination of the plain meaning of Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., which requires compliance by Federal facilities with State "requirements respecting control and abatement of air pollution," and consideration of the Congressional purpose and the scheme of the Clean Air Act as a whole clearly indicate that Federal facilities operating or controlling air contaminant sources in the Commonwealth of Kentucky are required to comply with Kentucky's permit requirement and all other requirements of the Kentucky Implementation plan adopted pursuant to Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5. In ruling that Federal facilities are subject only to those requirements of this Plan which are characterized as "substantive" the Court of Appeals For the Sixth Circuit has rewritten the statute to grant the affected facilities an exemption from other requirements contained in the Plan, an exemption which was neither intended by the Congress nor authorized under 42 U.S.C. §1857f. The primary responsibility for the control and prevention of air pollution at its source rests with the States and the Congressional plan was that this responsibility was to be met by the formulation and enforcement of State implementation plans designed to achieve and maintain the National standards of air quality promulgated by the Administrator of the Environmental Protection Agency. Accomplishment of this goal requires, and the Congress intended, that the provisions of these Plans be applicable to all air contaminant sources within a State, including those operated or controlled by the Federal Government.

II. Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2, does not provide, nor was it intended to provide, an alternative means by which the States are to meet their responsibilities under the Act. In addition to being limited to actions for violation of "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" this section was clearly designed to allow public participation in the enforcement of the standards of the Act and not as the primary tool of State enforcement. The approach and philosophy of this section are based in the penal principle of arrest, trial and punishment and are antithetical to the regulatory principles of prevention and control reflected in the requirements included in the State Implementation Plans in accordance with 42 U.S.C. §1857c-5, Section 110 of the Clean Air Act Amendments of 1970.

III. The Supremacy Clause is inapposite in this case for three reasons: (i) Federal facilities have been specifically subjected to State regulation in matters of air pollution control by Congressional waiver contained in Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f.; (ii) the provisions of Kentucky's Implementation Plan have been Federally approved and published in the Federal Register, in accordance with the Clean Air Act, as amended and are enforceable requirements of Federal law; (iii) application of the Supremacy Clause in this case is contrary to the purposes of the clause since the requirements of Kentucky's Implementation Plan do not in any way frustrate or pose an obstacle to the application of Federal law but rather were adopted in order to accomplish the objectives of the Clean Air Act, as amended.

The Doctrine of Sovereign Immunity is likewise inapplicable in the present case since the individuals against whom relief is sought have uniformly exceeded their authority as officers of the sovereign in refusing to comply with the mandate of a Federal statute and are properly subject to suit for specific relief.

ARGUMENT I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF SECTION 118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f., AND A REQUIREMENT NECESSARY TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED.

The conclusion of the Court of Appeals For the Sixth Circuit that Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., requires that Federal facilities operating air contaminant sources in the Commonwealth of Kentucky need only comply with the "substantive" requirements of Kentucky's Implementation Plan, (Appendix, p. 157, 165), is contrary to the plain meaning of this section, provides a judicially enacted exemption from air pollution requirements which is completely unsupported by other provisions of the Act, and does violence

to the carefully conceived Congressional plan for achieving the goas of the Clean Air Act, as amended. As written, this section paces an unequivocal, unlimited, and mandatory duty on those persons in charge of the administration of air contaminant sources operated by Federal facilities and instrumentalities to comply with State requirements respecting the control and abatement of air pollution. 42 U.S.C. §1857f. provides in pertinent part:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ."

In considering what the Congress intended by this enactment, this Court should first look to the plain unambiguous language of the statute. *Caminetti* v. *United States,* 242 U.S. 470, (1917). The language of 42 U.S.C. §1857f.is in no way ambiguous. All the language of this section is susceptible to precise definition in its ordinary usage and nowhere has Congress indicated it intended other than the ordinary meaning of the words used.

There can be no doubt that the mandate of this sec-

tion applies to the respondents herein; each is a "department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting in, or which may result, in the discharge of air pollutants," or is a responsible officer of such agency. The words "shall comply" are not possessed of the smallest measure of ambiguity nor do they vest the merest trace of discretion in those to whom the command applies. Further, the statute clearly sets out the thing with which respondents are to comply; "Federal, *State,* interstate, and local *requirements* respecting control and abatement of air pollution." (Emphasis Added). Notably, there is no language limiting this command other than the necessity that the "requirement" be one "respecting control and abatment of air pollution." The language employed does not warrant or authorize the exceptions and distinctions which the Court below wrote into the law; a "requirement respecting control and abatement of air pollution" is a requirement with which respondents "shall comply." Not only is it directed that the covered agencies "shall comply," but they "shall comply . . . to the same extent that any person is subject to such requirements."

In Kentucky, one of the primary "requirements" of State law respecting control and abatement of air pollution is a permit requirement contained in Kentucky Administrative Regulation AP-1, Section 5, which was included in Chapter 7 of Kentucky's Implementation Plan, and reads, in part:

> "(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect."

Through the use of the permit system, Kentucky is able to spell out the emission limitations, operating time requirements, emergency episode requirements, testing, monitoring, and record-keeping requirements under which each air contaminant source is to operate. In this regard, it is important to note that while the applicable emission standards are designed to meet the national ambient air quality standards, compliance with emission standards in the absence of controls on operating time, monitoring and inspection, and emergency episodes, will not be effective in achieving the goals. Consideration must be given to the total pollutant load in any area in order to set reasonable and effective emission standards. As well as providing the necessary inventory of pollution potential the permit system enables Kentucky to insure that proper air pollution control equipment is installed, it is the mechanism through which the Commonwealth is able to compel the production of data concerning air contaminant sources. including the ability to prescribe the monitoring techniques to be employed, and it is the only mechanism which allows the Commonwealth to develop and review a source's compliance schedule and insure that schedule is followed. The permit system constitutes the preventive arm of Kentucky's air pollution control program and is an effective tool for reducing air pollution from stationary sources as demonstrated by the Affidavit of Harold G. Peters filed in the District Court herein. [Pl. Ex. 1; Appendix, p. 117].

The significance of the permit system has also been recognized by the Federal government. In the Federal regulations initially proposed by the Environmental Protection Agency, the use of a permit system was a mandatory part of all implementation plans. 36 Fed. Reg. 158 (August 14, 1971). Though this mandatory permit requirement was deleted, the final rule adopted by the Environmental Protection Agency requires each state to have the authority to "obtain information necessary to determine whether air pollution sources are in compliance with all applicabe laws, regulations and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources." 40 C.F.R. §51.11(a) (5). In Kentucky, these functions are implemented by use of the permit system. If deprived of the use of this system, the Commonwealth would be saddled with the impossible burden of attempting to monitor the facilities of the respondents solely through periodic inspections. Moreover, since these monitoring, inspection, and recordkeeping functions are not emission standards, they would presumably be "procedural" requirements under the rulings of the Courts below. As such, they would be unenforceable by the State and the Commonwealth would have to rely on the polluters to turn themselves in. This, despite the requirement of the Environmental Protection Agency that such authority be included in each State's Implementation Plan.

In dealing with an almost identical provision of Alabama law, the Court of Appeals For the Fifth Circuit found:

> "[i]t is not only a part of the implementation plan but appears to be the central mechanism by which the Alabama plan provides for the gathering of information and the enforcement of emission limitations necessary to achieve air quality standards." *State of Alabama* v. *Seeber*, 502 F.2d. 1238, 1243 (1974).[3]

In so ruling that Court determined that the permit requirement was definitely a "requirement respecting control and abatement of air pollution" and, therefore, was a requirement which must be met. This is correct. The only standard and requirement set forth in 42 U.S.C. §1857f. is that the particular requirement be a "requirement respecting control and abatement of air pollution."

Petitioner submits that Kentucky's permit requirement is, similarly, a "requirement respecting control and abatement of air pollution." Certainly, it is a requirement of State law with which all persons operating private air contaminant sources in this Commonweath have had to comply. The plain meaning of 42 U.S.C. §1857f. requires such compliance by Federal facilities. Nowhere does this section make a distinction between "substantive" and "procedural" requirements as has been urged by respondents and accepted by the Courts below. In language of clear and uncompromising generality, with no provision for exception, other than by affirmative action of the President of the United States, the Congress has declared all Federal

---

3. The Opinion of the United States Court of Appeals For the Fifth Circuit rendered October 14, 1974, **State of Alabama v. Seeber**, 502 F. 2d 1238, (1974), is reproduced in its entirety in Appendix D, pages 1d-27d, of the Supplemental Memorandum to the Petition for Writ of Certiorari filed in this Court.

facilities and instrumentalities subject to state air pollution control requirements.

The Courts below and the respondents herein, would, presumably, have preferred §1857f. set out a list of certain requirements with which the facilities would be required to comply. Because each possible requirement is not listed specifically in the command to comply, respondents contend, and the Courts below have ruled, that certain requirements are not covered in a command covering State requirements generally. However, the requirements which are to be met *are* stated in §1857f.; they are "requirements respecting control and abatement of air pollution," without limitation. Further, the Congress gave a clear indication of the scope of such requirements in Section 116 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857d-1. Examination of this section clearly demonstrates that "requirements respecting control and abatement of air pollution" involve more than simply emission limitations as respondents contend. In *State of Alabama* v. *Sceber, supra,* at 1245, 1246, the Fifth Circuit Court of Appeals considered the argument advanced with respect to the scope of the applicable requirements and the substantive-procedural dichotomy and stated:

> "Defendants seek to avoid the impact of §118 by engrafting upon it a substantive-procedural overlay. They argue that the phrase 'requirements respecting control and abatement of air pollution' means only requirements such as emission standards and limitations, which they label 'substantive,' and does not include mechanisms, *e.g.*, permit systems, for enforcing these requirements.[6] Having affixed these new labels,

> defendants would have us infer that while federal agencies must, and will, comply with the 'substantive,' it was not intended that they be bound by the 'procedural,' a term which in defendants' construct is subsilentio pejorative, impliedly denigrating the Congressionally-mandated mechanisms of enforcement to a status of less dignity anl import. This recharacterization of the statutory scheme is a semantical red herring. It draws no sustenance from the Act itself. No such limitation is apparent from the words of §118. Moreover the language of §116 [42 U.S.C. §1857d-1] is inconsistent with defendants' reading of 'requirements.' There Congress used words identical to the §118 'requirements' phrase.
>
> > Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. . . .
>
> The 'or' in §116 is clearly disjunctive. Therefore, contrary to the position of the defendants, 'requirements' must include more than emission standards or limitations.

---

[6] This approach necessarily leads them to de-emphasize the remainder of the phrase, which reads 'to the same extent that any person is subject to such requirements.' "

In accepting and approving the substantive-procedur-

al distinction, the Courts below have effectively rendered meaningless the provisions of §1857d-1. This is clearly contrary to the rule of statutory construction requiring that effect should be given to every part of a statute. As the Court stated in *Washington Market Co.* v. *Hoffman,* 101 U.S. 112, 115, 116, 25 L. Ed. 782 (1879):

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, Section 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

The proper interpretation of 42 U.S.C. §1857d-1, giving effect to both clauses, does much to elucidate the scope and coverage of a "requirement respecting control and abatement of air pollution" within the meaning of §1857f. As shown by the Fifth Circuit's consideration of this provision in *State of Alabama* v. *Seeber, supra,* the only way to rationally harmonize these sections is to conclude the phrase includes those requirements which the Court below characterized as "procedural" as well as the "substantive" provisions.

The meaning of 42 U.S.C. §1857f. is, therefore, clear and unambiguous both as to the nature and the scope of the

command it contains. The only other rationale beyond ambiguity, which would necessitate an examination of the legislative history would be if (1) the results of the plain, uncompromising language would be absurd or (2) the purpose of the statute would be thwarted. *United States* v. *Katz,* 271 U.S. 354 (1926); *Helvring* v. *Hammel,* 311 U.S. 504 (1941). The result of the application of the plain meaning of §1857f. would be neither absurd nor would it thwart the purpose of the statute; on the contrary, it is entirely consistent with the scheme of control envisioned by the statute.

The goals of the Clean Air Act as a whole are embodied in Section 101(b) of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857(b):

> "(b) The purposes of this title are —
>
> '(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;'
>
> '(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;'
>
> '(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs;' and
>
> '(4) to encourage and assist the development and operation of regional air pollution control programs.' "

Clearly, then, one of the primary goals of the Act was to develop a "program" designed to achieve the "prevention and control of air pollution." That the air pollution prevention and control programs envisioned by the Act were to be State programs is clearly illustrated by the findings of the Congress embodied in Section 101 (a) of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 (a):

> "(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and
>
> (4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local program to prevent and control air pollution."

These sections demonstrate the States are to have primary responsibility in the area of air pollution and that the Federal government is to provide financial assistance and leadership in developing the State plans. In enacting the Clean Air Act, as amended, the Congress of the United States set out and prescribed a carfully conceived plan through which the control and prevention of air pollution was to be accomplished; a plan whose core concept was the development of State control and prevention programs utilizing *State* plans designed to implement minimum National standards of air quality. The specific mechanisms to be employed in this Congressional plan set out with particularity in other sections of the Act. In Section 107, of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-2, the Congress reaffirms the State's responsibility and directs that each shall prepare a plan for meeting these responsibilities:

> "Sec. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

The requirements for these "implementation plans" were set out in Section 110, of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5. The basic requirement contained in Subsection 1857c-5 (a) (1), was that the plan "provide for implementation, maintenance, and enforcement" of both the primary and secondary standards of ambient air quality promulgated by the Administrator pursuant to Section 109 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-4. Specific requirements for these plans are contained in Subsection 1857c-5 (a) (2). With respect to these requirements this Court stated in *Train* v. *National Resources Defense Council,* 43 U.S. L.W. 4467, 4469 (U.S., April 16, 1975):

> "In providing for such attainment, a State's plan must include 'emission limitations, schedules, and timetables for compliance with such limitations'; it must also contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards."

Among these "other measures" necessary to assure attainment and maintenance of the standards, it was required that the Plan:

"(C) . . . includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator.

* * *

(F) . . . provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators or stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority." 42 U.S.C. §1857c-5 (a) (2).

Clearly, these are requirements designed to give assurance that implementation plans adopted by the States are adequate *to enforce* the standards and *to implement* the necessary controls on air contaminant sources to accomplish the goals and purposes of the Act. The concern of Congress that such plans contain adequate assurance of enforcement capability shows they understood that the mere existence of standards is utterly meaningless without a means of administering and enforcing these standards; their concern

was that the States actually be able *to implement* the standards and achieve the goals of the Act. This is the Congressional "plan;" the "plan" for achieving the goals of the Act and to provide for the enhancement of the quality of this Nation's air.

Application of the plain meaning of 42 U.S.C. §1857f. is entirely consistent with the development and implementation of State plans for the control and prevention of air pollution at its source. This is not true of the interpretation offered by the Courts below. In making the distinction between those elements of Kentucky's Implementation Plan which were characterized as substantive and procedural, these Courts not only denied the State control over all pollution sources but have also ruled contrary to the principle of statutory construction which dictates that where a particular provision appears in a statute, the failure to include that same provision in another section will not be deemed inadvertent. 2 J. Sutherland, *Statutory Construction,* Sec. 4915 (3 Ed. 1943).

In areas where the Congress desired to exempt Federal facilities from compliance with a State requirement or where it wished to preclude State regulation totally, it consistently did so by the use of specific exclusionary language. For example, 42 U.S.C. §1857c-6 (c) (1) allows the Environmental Protection Agency Administrator to delegate to the States the power to enforce performance standards for new stationary sources "except with respect to new sources owned or operated by the United States." 42 U.S.C. §1857c-7 (d) (1) contains authority for the Administrator to delegate his authority to implement and enforce emission standards for hazardous air pollutants "ex-

cept with respect to stationary sources owned or operated by the United States." Such specific exclusion from State regulation is also found in 42 U.S.C. §1857c-9 (b) (1), wherein the Administrator has authority to delegate his authority respecting inspections, monitoring, and entry "except with respect to new sources owned or operated by the United States." The States are similarly precluded by specific statutory language in 42 U.S.C. §1857f-6a from adopting or attempting to enforce any standard relating to the control of emissions from new motor vehicles not adopted prior to March 30, 1966. Had Congress intended to exempt existing stationary sources operated by the Federal government from all State requirements except "applicable standards of air quality and emissions," it could easily have done so by the use of similar exclusionary language. No such language appears in 42 U.S.C. §1857f., but rather the Courts below have rewritten the statute to create such an exemption. This is not the proper function of the judiciary.

As was stated in 62 *Cases, More or Less, Each Containing Six Jars of Jam* v. *United States,* 340 U.S. 593, 596 (1951):

> "[o]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor subtract, neither to delete nor distort."

Moreover, the applicable exemptive process is clearly set out in 42 U.S.C. §1857f. The Federal government can obtain exemptions from any requirement of a State Implementation Plan when the President of the United States determines such an exemption to be in the paramount interest of the Nation. This is the only exemptive process provided for or authorized by 42 U.S.C. §1857f.; if any other exemption had been intended for existing Federal sources, the Congress would have added such exclusionary language as was uniformly done in all sections dealing with new Federal sources.

After ruling that the Alabama permit requirement was applicable to Federal facilities, the Fifth Circuit, in *State of Alabama* v. *Seeber, supra,* commented on the consistency of this position with the Act as a whole:

> "The general scheme that emerges from the Act as a whole appears to be that responsibility and authority for enforcement with respect to federal facilities is granted to the states for sources with respect to which state implementation plans establish the criteria for enforcement, and is granted to EPA in those instances (*i.e.*, new sources and hazardous pollutants) where EPA establishes the criteria. The scheme is a reasonable one. Because of variations in air quality between states and regions the emissions criteria established under state plans may vary considerably, thus making enforcement by EPA against scattered federal facilities administratively difficult. The new sources and hazardous pollutant criteria established by EPA, however, are not tied to air quality standards and may, therefore, vary little or not at all by area, making EPA enforcement against federal facilities more convenient." *State of Alabama* v. *Seeber, supra,* at 1244.

However, the Sixth Circuit Court of Appeals did not choose to enter into any such analysis of the consistency of its ruling with the Act as a whole, but rather supports it Opinion with a reading of the legislative history which the

Fifth Circuit termed "strained" (*State of Alabama, supra,* at 1246) and the petitioner herein regards as incomplete. Notable in its absence from the Sixth Circuit's discussion of legislative history is any consideration of the provisions of prior law. Petitioner submits that in seeking the purpose of a statutory enactment, particularly where the enactment is an amendment of existing law, it is important to consider the provision which was changed.

Prior to the enactment of Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., the Congress had required a program of voluntary cooperation in the area of air pollution by Federal agencies, embodied in Section 111 of *The Air Quality Act of* 1967, P.L. 90-148:

> "COOPERATION BY FEDERAL AGENCIES TO CONTROL AIR POLLUTION FROM FEDERAL FACILITIES
>
> Sec. 111 (a) It is hereby declared to be the intent of Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare and with any air pollution control agency in preventing and controlling the polution of the air in any area insofar as the discharge of any matter from or by such building, installation, or other property may cause or contribute to pollution of the air in such area."

What is immediately apparent from this provision is that

in enacting §1857f., the Congress intended a radical change from the provisions of previous law; an examination of these two provisions clearly indicates that Congress wished to depart from an ineffective program of voluntary cooperation and move instead to a program of mandatory compliance. If, in making such a change, the Congress had desired to make only compliance with "emission standards or limitations" mandatory, it need only have so stated. Obviously, this was not the Statement made in Section 118, and, moreover, this was not the Statement made in either the Senate or the House version.

The Senate version of this section would have directed each Federal agency to "comply with the requirements of this Act in the same manner as any other person would so comply. . . ." [4] The meaning of this phrase does not become clear until the complete statutory scheme is examined to determine the manner of compliance by other persons and the requirements which they must meet. Similarly, The House version would have required compliance with "applicable Federal, State, interstate, and local emission standards and with the purposes of this Act. . . ." [5] As shown earlier, one of the primary purposes of the Act is to provide assistance to the States and local governments in the development and execution of their air control programs, (42 U.S.C. §1857(a)), a program which, in Kentucky, includes a permit requirement. In neither instance is there a simple statement that these facilities need only comply with "emission standards and limitations." Both

---

4. S. 4358, 91st. Congress, 2d. Session, Sec. 118 (1970).

5. H.R. 17255, 91st. Congress, 2d. Session, Sec. 111 (1970).

versions raise questions concerning additional requirements relative to "the purpose of this Act," and the manner of compliance by "any other person." However, the District Court and the Sixth Circuit Court of Appeals herein each conclude based on this authority that "requirements respecting control and abatement of air pollution" are nothing more than "emission standards or limitations." (Appendix, p. 129 and Appendix, p. 157). This conclusion is clearly not warranted; as this Court stated in *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260, 89 L.Ed. 921, 933 (1945):

> "The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

See also: *Ex Parte Collett,* 337 U.S. 55, 69, S.Ct. 944, 93 L.Ed. 1207 (1949).

The only thing that is clear from an examination of the legislative history of 42 U.S.C. §1857f. is, therefore, a Congressional desire to make compliance mandatory. As discussed in *State of Alabama* v *Seeber, supra,* at 1245:

> "In strengthening the Act by replacing that section with present §118 Congress sought to depart from the policy of voluntary compliance and make emission limitations enforceable against federal facilities. With respect to existing sources the Act places upon the states primary responsibility for establishing and enforcing emission limitations, and Alabama, like many other states, relies on a permit system as its method

of enforcement as well as a method of generating information concerning emissions. To deny the applicability to federal facilities of that permit requirement would be tantamount to a return to the Congressionally-rejected policy of voluntary compliance by federal facilities.[5] Moreover a holding that §118 does not embrace permit systems would represent a retreat from the provisions of prior §111. That section allowed the Secretary of HEW to establish classes of pollution sources for which federal facilities could be required to obtain a permit from the Secretary. Since §118 does not distinguish between federal and state requirements, holding state permit systems outside the scope of §118 would imply the same conclusion with respect to any federal permit system. The result would be that the Administrator of EPA (who assumed responsibility for air pollution control activities when EPA was established) could not under the stronger §118 do what the Secretary of HEW was explicitly entitled to do under the prior §111.

---

[5]. Defendants argue that the state could seek to enforce its emission limitations by resort to court actions under the 'citizens suits' provision, §304 [42 U.S.C. §1857h-2] of the Act. Irrespective of the merits of this suggestion, we believe that §304 provides little guidance to determining the Congressional purpose in enacting §118. . . ."

The Fifth Circuit later concludes "with regard to this question of legislative history, except to the extent that it reveals the Congressional purpose discussed earlier, is ambiguous. Confronted with this ambiguity, we rely on

the words of §118, the scheme of the Act as a whole, and what we discern to be the Congressional purpose, as the best guides to interpreting the section." (*State of Alabama* v. *Seeber, supra,* at 1247).

It has been, and is, petitpioner's contention that an examination of the legislative purpose of the Clean Air Act Amendments of 1970, a tracing of the "scheme" for achieving those purposes through the Act as a whole, and the plain, unambiguous language of §42 U.S.C. §1857f., lead unalterably to the conclusion that the requirements of a State's Implementation Plan, adopted pursuant to Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5, are "requirements respecting control and abatement of air pollution" within the meaning of §1857f. As such, they are requirements with which Federal facilities "shall comply" under the mandate of 42 U.S.C. §1857f. The question in this case is not whether a particular State requirement may be classified as procedural or substantive, but rather whether that requirement is a "requirement respecting control and abatemnt of air pollution." Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., does not make any distinction as to "procedural" or "substantive" requirements, either is useless without the other, but rather directs that Federal agencies and instrumentalities "shall comply with . . . State . . . requirements respecting control and abatement of air pollution" The permit requirements embodied in Section 5 of the Kentucky Administrative Regulation AP-1 and in Chapter 7 of the Kentucky Implementation Plan, is clearly such a requirement in Kentucky. The decisions of the Courts below which granted all Federal facilities blanket judicial exemption from the requirements of Kentucky's Impementation Plan do violence to the carefully conceived regulatory scheme of Congress, a scheme in which the States were given primary enforcement responsibility.

There can be no implementation of the standards of air quality if these standards stand alone without a mechanism of enforcement to assure they are met by all sources. It is just such a mechanism which was provided for in 42 U.S.C. §1857c-5. The provisions of the implementation plans adopted and approved in accordance with this section are absolutely necessary to the achievement of the goals of the Clean Air Act, as amended, and these are the "requirements respecting the control and abatement of air pollution" which the Congress made applicable to Federal facilities and instrumentalities in Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f.

ARGUMENT II

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FINDING THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT ARE SUBJECT ONLY TO ACTIONS UNDER SECTION 304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2, AND THIS RULING PRESENTS A SIGNIFICANT HINDRANCE TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED.

The Court of Appeals For the Sixth Circuit erred in its construction of the Clean Air Act, as amended. particularly with respect to Section 118 and Section

304 of the Clean Air Act Amendments of 1970, 42 U.S. C. §1857f. and §1857h-2 and the interrelation of those sections. The error in the reasoning of the Court below is reflected in its conclusion that:

> "Congress intended that federal facilities comply with the emission standards and limitations of the state plan where they are located. Such compliance is mandated by Section 118 and made enforceable by legal action pursuant to Section 304. By defining the term 'emission standard or limitation' broadly in Section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation." [Appendix, 157, 168].

In this statement, the Court below has ignored the fact that 42 U.S.C. §1857f. does not mandate compliance with the "substantive provisions of a state plan," but rather requires compliance with State "requirements respecting control and abatement of air pollution." Further, it is unnecessarily strained and circuitous to say compliance with "substantive provisions of a state plan" is "mandated by Section 118 and made enforceable by legal action pursuant to Section 304" since 42 U.S.C. §1857h-2 itself quite clearly "mandates" compliance with such requirements and provides for such legal action completely independent of 42 U.S.C. §1857f. This section, 42 U.S.C. §1857h-2, provides, in pertinent part:

> "Sec. 304. (a) Except as provided in subsection

> (b), any persons may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.
>
> * * *
>
> (f) For purposes of this section, the term 'emission standard or limitation under this Act' means—
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive.

which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan."

It is clear from these provisions that suits brought under §1857h-2 are strictly limited to violations of compliance schedules, emission standards, and standards of performance and may be maintained independently of §1857f. Further, no mention is made of any other requirements which may be contained in implementation plans. It is a well established rule of this Court, followed numerous times, that every provision of a statute is to be construed, if possible, so as to give it operative meaning and a corollary that no section of a statute should be given a construction which will render it redundant or meaningless where another interpretation will give it effect.[6] In making the determination that the State may enforce only those parts of its implementation plan deemed "substantive provisions, "the Courts below have rendered 42 U.S.C. §1857f. a mere restatment of 42 U.S.C. §1857h-2 in contravention of this principle of construction.

---

6. **Washington Market Co. v. Hoffman**, 101 U.S. 112, 25 L.Ed. 782 (1879); **Jarecki v. G. D. Searle & Co.**, 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed. 2d. 859 (1961); **Weinberger v. Hynson, Westcott & Denning, Inc.**, 93 S.Ct. 2469 (1973).

As the title, "Citizen Suits," implies, the primary purpose of §1857h-2 is to authorize the participation by private citizens, acting on their own behalf, in the enforcement of the standards set forth in the Act and the implementation plans. The legislative history of this provision clearly demonstrates that the intent was to extend enforcement capability to private individuals, not to limit or define the extent of the State's ability to enforce their implementation plans. This may be demonstrated by the comments of the drafters of this provision:

Senator Cooper, *Congressional Record,* Volume 116, Part 24, p. 33117:

"The committee bill also breaks new ground in extending public participation, an essential element throughout the act, to enforcement proceedings. In section 304, the bill proposes to grant jurisdiction to the Federal district courts to hear charges of violation of particular provisions of the act brought by citizens acting in their own behalf."

Senator Muskie, *Congressional Record,* Volume 116, Part 24, p. 33103:

"What we are talking about here is a judicial way for citizens to enforce the provisions of this act. May I make another point about it, that before any citizen can bring an action, he is required to notify the enforcement agency concerned of his intent to do so, and the specific alleged violation which he has in mind. In other words, the idea is

to use citizens to trigger the enforcement mechanism. If that enforcement mechanism does not respond, then the citizen has the right to go to court."

Senator Spong, *Congressional Record,* Volume 116, Part 24, p. 32919:

"It is not our intent to substitute citizens suits for the enforcement efforts of the responsible administrative agencies. Rather, we intend the provision to complement and encourage the abatement activities of governmental agencies."

Senator Muskie, *Congressional Record,* Volume 116, Part 24, p. 32927:

"First of all, a citizen suit can be brought only to enforce the provisions of the act or the requirements that are established as a result of the operations of the act. In other words, a citizen suit is limited to the right to seek the enforcement of the provisions of the act.

Second, before bring [sic] suit, there is a requirement in this provision that the citizen bring his intention to bring suit to the attention of the local enforcement agency, the thought being that he might trigger administrative action to get the relief that he might otherwise seek in the courts."

Particularly noteworthy in these comments is the relation seen between primary administrative action and citizens suits. It is apparent that these Senators

did not equate such administrative action with judicial relief under 42 U.S.C. §1857h-2. Rather, it was anticipated that where a problem was brought to the attention of the responsible administrative agency, the necessity of court action under §1857h-2 would often be eliminated by the application of administrative remedies under that agency's primary enforcement powers.

This underscores the basic error which has been made by the Courts below in their failure to recognize that the Clean Air Act, as amended, is primarily a regulatory statute. The Act is geared to the regulation, control, and prevention of air pollution at its source; it provides for administrative action, the gathering and assessing of data, the development, dissemination, and use of new technology, and it directs the formulation and employment of implementation plans designed to acheive and maintain the National standards of air quality. However, notwithstanding the requirements of the Act that the States are to formulate and adopt comprehensive *implementation plans* and despite the provisions of the Act specifying the powers and authorities which these plans are required to contain to assure that the plans can be effectively carried out, the Courts below conclude that the standards are to be *"implemented"* by the use of legal action under the Citizen Suit provision of the Act, 42 U.S.C. 1857h-2.

This manner of implementation is not based on regulation. prevention, and control as was intended by the Congress but rather relies on an entirely different principle reflecting a different philosophy and

approach; the penal principle of arrest, trial, and punishment.

Actions under 42 U.S.C. §1857h-2 are strictly limited to cases of a violation of a compliance schedule, emission standard, or a standard of performance. While an action to enjoin further violation may be perfectly appropriate, it bears little or no relation to the concepts of control and prevention, the functions which the State is charged with carrying out. Moreover, the necessity of an abatement proceeding would be ample evidence that the State's program of prevention and control was ineffective. The rulings of the Courts below and the position maintained by the respondents herein effectively reduce this Commonwealth to the role of policeman, catching violators and bringing them to justice in the courts. This is not reflective of the Congressional plan for the implementation of the standards of the Act.

Accomplishment of the goals of the Act requires planning and control over all sources of air pollution, for it is a fact of life in the United States today that few of the major sources of air pollution, including facilities operated by the Federal Government as well as private enterprise, are currently in compliance with all minimum standards necessary to protect human health. In the face of this problem, the rulings of the Courts below place the implementation of these standards under a system much better suited to dealing with instances of deviation from an accepted norm. What

is needed in the area of air pollution control, and what was provided by the Congress in the Clean Air Act, as amended, is a system which is capable of raising the National norm to a new and higher standard.

In enacting 42 U.S.C. 1857f. it was the intent of Congress to grant the States a right commensurate with their responsibilities; the right to prevent and control air pollution at its source and to that end to exercise the requisite control over all sources within their boundaries. 42 U.S.C. 1857h-2 does not provide this requisite control and does not provide an alternative through which the States can meet their responsibilites under the Act, nor was it intended to. As stated by the Court of Appeals for the Fifth Circuit in *State of Alabama* v. *Seeber,* 502 F.2d. 1238, 1248 (1974):

> "The 'Citizens Suits' heading of §304, the fact that §304(d) provides for awarding attorney fees, and the legislative history of the section demonstrate that the congressional focus in enacting that provision was on suits by private parties. Consequently, we believe that §304 cannot be properly read as implying anything about the ability of states to sue under §118."

The ability to bring suit for a violation of a compliance schedule is no substitute for the ability to participate in the formulation of that schedule or for a prior review of the control strategies and equipment to be employed. The rulings of the Courts below have

effectively precluded the efficient employment of this Commonwealth's implementation plan, a plan which Congress intended to be the primary mechanism through which the National primary and secondary standards of ambient air quality were to be achieved and maintained in this State. In meeting the State's responsibilities under the Act, Kentucky must rely, not on the plan required in the Act, but on the good intentions of the polluters and the hope that they will provide the State with enough information to support an abatement action in cases of non-compliance. This is clearly contrary to the intent of Congress and does not provide for the prevention and control of air pollution and the planned implementation of the air quality standards which the Clean Air Act, as amended, was designed to achieve.

ARGUMENT III

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2.

A. SUPREMACY CLAUSE

The reliance of the Court of Appeals For the Sixth Circuit on the Supremacy Clause of the United States Constitution in this action is misplaced and in error. (Appendix 157, 164, 165) There are at least three reasons why the Supremacy Clause is inapposite

herein. First, Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., expresses a clear Congressional waiver and specifically subjects Federal facilities to State regulation. Second, the provisions of Kentucky's Implementation Plan have been Federally approved and published in the Federal Register[7] and are enforceable requirements of Federal law. Third, application of the Supremacy Clause in this action is contrary to the policy supporting the rule since the provisions of Kentucky's Implementation Plan do not frustrate Federal law, the evil against which the Supremacy Clause protects.

The power of Congress to waive the immunity of the Federal government under the Supremacy Clause is clear. As was stated in *Mayo* v. *United States,* 319 U.S. 441, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1943):

> "It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities."

---

7. Kentucky's Implementation Plan was originally approved on May 31, 1972. 37 Federal Register 10842. This approval was vacated in the case of **Buckeye Power Co., et al v. EPA,** 481 F.2d. 162 (6 CA, June 28, 1973). The Kentucky Plan was resubmitted and published by the Administrator of Environmental Protection Agency as proposed rule making on March 19, 1974. 39 Federal Register 10277. On August 15, 1974, the Administrator of Environmental Protection Agency published his approval of the re-submitted Kentucky Plan with one exception not relevant to the issues herein. 39 Federal Register 29357.

In this case, the Congress has enacted such a waiver. In enacting 42 U.S.C. §1857f. the Congress has declared clearly, explicitly, and most affirmatively, that Federal facilities "shall comply" with State air pollution requirements:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U.S.C. §1857f.

It is difficult to imagine how Congress could have made a more affirmative declaration that the facilities of the Federal government were subject to State regulation than was made in this section. The uncompromising and unlimited language employed leaves no room for discretion; if the requirement is a "requirement respecting control and abatement of air pollution," it is a requrement to which Federal facilities are subject. As discussed more fully in Argument I of this Brief, the permit requirement contained in Kentucky's Implementation Plan is definitely a requirement respecting control and abatement of air pollution.

In the case of *State of Alabama* v. *Seeber*, 502 F.

2d. 1238, 1243 (1974), the Court of Appeals for the Fifth Circuit construed this language and concluded:

> "The phrase 'shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements' effectively conveys a Congressional intent that federal facilities are to be treated equally with private facilities in the scheme of control established by the Act. Recognizing that in particular instances such treatment might prove inconsistent with the national interest, the section provides for executive exemption from any requirement."

Having so concluded, the Court of Appeals For the Fifth Circuit ruled:

> "It is on the proper interpretation of §118 that we part company with the Sixth Circuit. For the reasons explicated in Part I, *supra*, we believe that §118 does embrace the Alabama permit requirement. Having reached this conclusion, the Supremacy Clause is applicable because Congress has authorized subjecting federal facilities to the State regulation involvd. 'It lies within Congressional power to authorize regulation . . . by the state of federal instrumentalities.' *Mayo* v. *United States*. 319 U.S. 411, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1948). Section 118 adequately meets the requirement that Congress 'affirmatively declare its instrumentalities or property subject to [state] regulation. . . .' Id. at 448, 63 S.Ct. at 1141,

87 L.Ed. at 1509." *State of Alabama* v. *Seeber, supra,* at 1247, 1248.

Similarly, the Court of Appeals For the Ninth Circuit recently ruled that a virtually identical provision of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251 et. seq., contained such a waiver of Federal immunity under the Supremacy Clause. In construing Section 313 of that Act, 33 U.S.C. §1323 in the case of *California* v. *EPA*, 7 ERC 1667, 1671, (9 CA, Feb. 13, 75), the Court of Appeals For the Ninth Circuit ruled:

"Having determined that Congress had the power to

---

8. 33 U.S.C. § 1323, reads as follows:
"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation."

compel agencies within its 'exclusive' legislative jurisdiction to seek state discharge permits, we now consider whether it acted in a sufficiently unequivocal manner for us to conclude that it clearly intended to do so. *See, e.g., United States* v. *King*, 395 U.S. 1, 4 (1969). We find the language of waiver sufficiently clear and free from ambiguity."

Having so ruled, the Court goes on to state:

"Section 313 also requires federal agencies to comply with state pollution control requirements 'to the same extent that any person is subject to such requirements.' Hence, the extent of the federal agency compliance duty can only be gauged from the type of program that section 402 of the Act demands that states institute for private dischargers." *California* v. *EPA, supra,* at 1672.

Further, with respect to the nature and scope of the requirements imposed under Section 313 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1323, the Court concluded:

"[I]t would appear that the reference in Section 313 to federal agency compliance with state 'requirements,' was purposeful and artistic, and was meant to refer to those requirements which state administrative agencies might adopt under their express Section 402 authorizations." *California* v. *EPA, supra,* at 1673.

Section 402 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1342, sets forth the requirements which must be incorporated into a State program before the Administrator of the Environmental Protection Agency

may delegate that State the authority to administer the National Pollutant Discharge Elimination System. These requirements relate the State's authority to implement and enforce the standards established under this Act and in this regard serves the same function as does Section 110, 42 U.S.C. §1857c-5, with respect to the Cleam Air Act Amendments of 1970. The rulings of the Ninth Circuit on the relation of Section 313 and Section 402 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1323 and 33 U.S.C. §142, are, therefore, directly applicable to the relation of Section 118 and Section 110 of the Clean Air Act Amendments of 1970, 42 U.SC §1857f and 42 U.S.C. §1857c-5, and are supportive of the conclusion that the requirements of Kentucky's Implementation Plan, adopted pursuant to §1857c-5 are applicable to Federal facilities under §1857f.

The ability of Congress to employ broad and uncompromising language in waiving Federal Supremacy and subjecting Federal facilities to State regulation was also established in *Baltimore National Bank* v. *State Tax Commission,* 297 U.S. 209 (196). The issue presented in that case was the power of a state to tax shares in a national bank which were held by an instrumentality of the Federal government. The Court held that the State did have such a power, and based its holding on the fact that Congress had consented to this taxation by statute. The language of this statute indicated that "all" the shares of a national banking association whose principal place of business is within the limits of a State are subject to taxation at the discretion of that State's legislature. From this, the Court reasoned that shares held by an agency of the Federal government were taxable. In the instant case, the language of 42 U.S.C. §1857f. is even more explicit in indicating the consent of Congress to waive any insulation that a Federal facility might possess under the Supremacy Clause; §1857f. expressly provides that the Federal facilities are subject to local "requirements" in air pollution matters. This is a clear and unequivocal waiver of any Federal primacy under the Supremacy Clause.

The Supremacy Clause does not pose a bar to this action for the further reason that the requirements of Kentucky's Implementation Plan are enforceable as Federal, as well as State, law. The Kentucky Plan was adopted in accordance with Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5, and was submitted to the Administrator for approval. The Plan was subsequently approved, with minor exceptions, and was published in the Federal Register by the Environmental Protection Agency[9], and became a regulation enforceable by the Administrator under Federal law. The relationship between Federal law and a State implementation plan was discussed in the case of *Getty Oil Company (Eastern Operations)* v. *Ruckelshaus,* 342 F.Supp. 1006 (D. Del. 1972), *modified* 467 F.2d 349 (3rd. Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973). That case dealt with an oil company's obligation under a compliance schedule that was part of a local regulation. The United States District Court in Delaware concluded:

"In the terminology of the statute and regulations,

---

9. 39 Federal Register 29357. See footnote (7) on page 49 of this Brief.

> Delaware's Regulation IV is a part of the compliance schedule incorporated in Delaware's Implementation Plan. It has received federal approval and *violation thereof is a federal crime* enforceable by the Administrator. . . ." 342 F.Supp. 1006, 1017. (Emphasis Added).

Refusal to comply with the permit procedures contained in Kentucky's Implementation Plan is, therefore, a violation of Federal, as well as State, law. As was discussed by the Administrator of the Environmental Protection Agency in the Guidelines for Implementation Plans:

> "Upon approval by the Administrator, a State plan is enforceable by the Administrator under the Clean Air Act. All approved provisions relating to attainment and maintenance of national standards, including approved rules and regulations, are subject to such enforcement action. Where a State plan includes regulations designed to attain and maintain air quality better than that required by national standards, such regulations are subject to enforcement action under the Clean Air Act unless they are separate from those necessary for attainment and maintenance of national standards."
>
> 37 Fed. Reg. 10846 (May 31, 1972).

Section 113 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-8, reads, in part:

> "Sec. 113. (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of

> an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such findings. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b)."

This section demonstrates that the provisions of State implementation plans are Federally enforceable. Moreover, the requirement that the State be notified and given thirty days to act is indicative of a preference that these Federal requirements be enforced by State action. Therefore, in refusing to comply with the requirements of Kentucky's Implementation Plan, the respondents herein are not simply resisting a regulation adopted *sua sponte* by Kentucky in the provincial exercise of its police power, but they are refusing to comply with a regulation enforceable under Federal law. No reading of the Supremacy Clause can justify the refusal of respondents to comply with these Federal regulations.

Finally, the application of the Supremacy Clause is inappropriate in this case because the regulations which Kentucky seeks to impose do not in any way act to frustrate or thwart the application of Federal law, but rather are in furtherance of and were adopted pursuant to Federal law. In the case of *Perez* v. *Campbell,* 402 U.S. 637 (1971), this Court quoted with approval the standard for determining whether a State statute was in conflict with the Supremacy Clause first enuncicated in *Hines* v *Davidowitz,* 312 U.S. 52 (1941):

> "'In the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Perez* v. *Campbell, supra,* at 649.

See also: *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S 224 (1964); *Nash* v. *Florida Industrial Comm.,* 389 U.S. 235 (1967).

Applying the *Hines* test to the instant case, there is no question that these requirements do not conflict with Federal law since it is through the application of the State implementation plans that the objectives and goals of the Clean Air Act are to be obtained In fact, it was at the specific direction of Congress that these plans were formulated and adopted. Under these circumstances, the Supremacy Clause is clearly not a bar to this action to secure compliance with the provisions of Kentucky's Plan.

B. SOVEREIGN IMMUNITY

The Court of Appeals For the Sixth Circuit has also ruled that with respect to all non-Tennessee Valley Authority respondents, the Doctrine of Sovereign Immunity is applicable in this case (Appenix, p. 157, 164, 165). However, none of the respondents herein are shielded behind this Doctrine under the specific allegations of the Complaint in this action. (Appendix, p. 1-34). There is a legion of cases which have held that the Doctrine has no application whatsoever in those instances where a Federal officer or employee has violated his duties under a Federal

statute. See: *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Malone* v. *Bowdoin,* 369 U.S. 643 (1962); *Carter* v. *Seamons,* 411 F.2d 767 (5 CA 1969) *cert. den.* 397 U.S. 941 (1970); *State of Washington* v. *Udall,* 417 F.2d 1310 (9 CA 1969). In the leading case of *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682, 689, 93 L. Ed. 1628, 1635, 1636 (1949) this Court stated:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign . . . [w]here the officer's powers are limtied by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief"

The circumstances described above are precisely the circumstances which are present in this case. As alleged in the Complaint in this action, (Appendix, p 1-34), 42 U.S.C. §1857f. imposes a mandatory duty on those persons responsible for the administration and operation of Federally owned or operated air contaminant sources to comply with the requirements of State law; a duty which they have uniformly failed to perform.

In the case of *Carter* v. *Seamons,* 411 F2d. 767 (5 CA 1969), *cert. den.,* 397 US 941 (1970), the Fifth Circuit Court of Appeals adopted the procedure of "accepting at face value, for jurisdictional purposes, the averments of the complaint unless they are so

transparently unsubstantial or frivolous as to afford no possible basis for jurisdiction, and of giving the averments thus accepted their natural jurisdictional consequences." Applyng that procedure, the Court found, for jurisdictional purposes only, "the case sub judice is not against the United States, but one rather to compel the Secretary of the Air Force to perform a clear legal duty" *Carter* v. *Seamons, supra,* at 771. Accordingly, the Court held the defense of sovereign immunity was unavailable. See also: *Davis, Administrative Law Treatise,* Volume 3, 27.03, in which it is observed:

> "Despite the pervasive inconsistencies, the case law is dominated by one outstanding generalization that is usually followed but sometimes violated — that sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution."

In the present case, the individuals against whom relief is sought have uniformly exceeded their authority in refusing to comply with the mandate of a Federal statute and are properly subject to suit for specific relief. Moreover, Congress has consented to such suits against the United States in the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. See: *County of Milwaukee* v. *Veteran's Administration,* 5 ERC 1412 (ED Wisc., May 7, 1973), in which the Court dismissed the Veteran's Administration's argument that sovereign immunity barred a suit by Milwaukee County to force it to comply with a county ordinance requiring the use of dust separating equipment. The Court correctly held that §1857f. was a Congressonal consent to suits against Federal agencies that fail to comply with State requirements respecting the control and abatement of air pollution. See also: *State of Alabama* v. *Seeber,* 502 F.2d. 1238 (1974).

CONCLUSION

The construction of the Clean Air Act embodied in the decisions rendered by the United States District Court For the Western District of Kentucky and the United States Court of Appeals For the Sixth Circuit does violence to the carefully conceived plan of the Congress for the implementation of the National primary and secondary standards of air quality and constitutes a significant hindrance to the proper employment and administration of Kentucky's Implementation Plan and the achievement of the goals of the Act. In order to provide that the States have the requisite authority needed to fulfill their responsibilities for the control and prevention of air pollution at its source, the Congress declared in Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., that Federal facilities and instrumentalities operating or controlling air contaminant sources were to comply with State "requirements respecting control and abatement of air pollution." The body of these requirements in

the Commonwealth of Kentucky are contained in its Implementation Plan, adopted and approved in accordance with the direction and requirements of Section 110 of the Clean Air Act Amendments of 1970. 42 U.S.C. §1857c-5.

The Courts below have, however, written into the law provisions exempting Federal facilities from compliance with this Plan in contravention of the intent of Congress. In ruling that the provisions of this Commonwealth's Implementation Plan are not "requirements respecting control and abatement of air pollution" and that the National primary and secondary standards of ambient air quality are to be implemented through legal action under Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2, the Courts have thwarted and frustrated the regulatory scheme enacted by the Congress and have exempted many of this Commonwealth's major air contaminant sources from the control and review necessary to implement the standards and end the defilement of the air of the United States.

For these and the foregoing reasons, the Judgments of the United States District Court For the Western District of Kentucky and the United States Court of Appeals For the Sixth Circuit should be reversed and an Order entered granting Petitioner's Motion for Summary Judgment and requiring Respondents herein to comply with the provisions of Kentucky's Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards, as required by the Clean Air Act, as amended.

Respectfully submitted,

ED. W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

BY: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

BY: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein BRIEF FOR PETITIONER Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, was served by mailing three copies hereof, via United States mail, air mail postage prepaid, to: Honorable William B. Saxbe, Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Robert H. Bork, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Harry R. Sachse, Assistant Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530;Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Robert H. Marquis, General Counsel, Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Honorable Beauchamp E. Brogan, Associate General Counsel, and Honorable Justin M. Schwamm, Assistant General Counsel, Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee, 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee, 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia,

and Honorable Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219; Honorable Evelle Younger, Attorney General, State of California, and Honorable Foster Knight, Deputy Attorney General, Honorable Roderick Walston, Deputy Attorney General; Honorable Robert H. O'Brien, Assistant Attorney General, and Honorable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California, 90012; Honorable John J. Hill, Attorney General, State of Texas, and Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas, 78711, AND by mailing three copies hereof, via United States mail, postage prepaid, to: Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky, 40202; Honorable James F. Gordon, Judge, United States District Court, Western District of Kentucky, United States Courthouse, Louisville, Kentucky, 40202; and Honorable Lester L. Cecil, Senior Circuit Judge, Honorable Pierce Lively, Circuit Judge, and Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio, 45202, and further the undersigned hereby certifies that all parties re-

quired to be served in this action have been served, all this the 29 day of April, 1975.

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF
KENTUCKY

By: David D. Beals

David D. Beals
Assistant Attorney General
Commonwealth of Kentucky

Supreme Court, U. S.
FILED
JUL 22 1975
MICHAEL RODAK, JR., CLERK

No. 74-220

In the Supreme Court of the United States

OCTOBER TERM, 1975

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
A. RAYMOND RANDOLPH, Jr.,
Deputy Solicitor General,
JACQUES B. GELIN,
ROBERT L. KLARQUIST,
Attorneys,
Department of Justice,
Washington, D.C. 20530.
ROBERT H. MARQUIS,
General Counsel,
Tennessee Valley Authority,
Knoxville, Tenn. 37902.

HERBERT S. SANGER, Jr.,
Deputy General Counsel,
BEAUCHAMP B. BROGAN,
Associate General Counsel,
Tennessee Valley Authority,
Knoxville, Tenn. 37902.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulation involved	2
Statement	2
A. Petitioner's complaint	2
B. The background of petitioner's complaint	4
1. The regulations of the Kentucky Air Pollution Control Commission relating to operating permits	5
2. The response of the federal facilities to the state commission's request that they apply for state permits	7
3. The advice given to federal facilities by the Environmental Protection Agency	3
C. The proceedings below	11
Summary of argument	13
Argument:	
Section 118 of the Clean Air Act, as amended in 1970, does not require federal facilities to seek and obtain state air pollution control permits in order to operate within the state	17
A. When read in view of the Act as a whole, the language in Section 118 directing federal facilities to comply	

Argument—Continued
with state air pollution "requirements" means only that such facilities must meet state emission standards or limitations 20
B. The legislative history of Section 118 confirms that Congress did not intend to alter the traditional federal-state relationship by requiring federal facilities to obtain state operating permits 27
C. Both the Environmental Protection Agency, which is charged with the administration of the Act, and the President, who is responsible for assuring compliance by federal facilities with Section 118, have interpreted that provision to mean only that such facilities must meet state emission standards and limitations and this interpretation is entitled to great weight 31
Conclusion 35

CITATIONS

Cases:
Alabama, State of v. *Seeber*, 502 F. 2d 1238, petition for a writ of certiorari pending, *sub nom. Seeber* v. *Alabama*, No. 74–851 ..... 12, 26
Arizona v. *California*, 283 U.S. 423 30
Black v. *Magnolia Liquor Co.*, 355 U.S. 24 26
Boston Sand and Gravel Co. v. *United States*, 278 U.S. 41 19
Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 19

Cases—Continued
Page
Buckeye Power, Inc. v. *Environmental Protection Agency*, 481 F. 2d 162 5
Cass v. *United States*, 417 U.S. 72 19
Chemehuevi Tribe of Indians v. *Federal Power Commission*, No. 73–1380, decided March 3, 1975 23
Duparquet Co. v. *Evans*, 297 U.S. 216 23
Federal Power Commission v. *Oregon*, 349 U.S. 435 30
Hadden v. *The Collector*, 5 Wall. 107 26
Johnson v. *Maryland*, 254 U.S. 51 30
Leslie Miller, Inc. v. *Arkansas*, 352 U.S. 187 30
McCullouch v. *State of Maryland*, 4 Wheat. 316 30
Mayo v. *United States*, 319 U.S. 441 30
Northern States Power Co. v. *State of Minnesota*, 447 F.2d 1143, affirmed, 405 U.S. 1035 30
Ohio v. *Thomas*, 173 U.S. 276 30
Panama Refining Co. v. *Ryan*, 293 U.S. 388 23
Train v. *Natural Resources Defense Council*, No. 73–1742, decided April 16, 1975 ..... 4, 13, 16, 21, 22, 32
Udall v. *Tallman*, 380 U.S. 1 32
United States v. *American Trucking Associations, Inc.*, 310 U.S. 534 19
United States v. *Cooper Corp.*, 312 U.S. 600 21
Constitution, statutes, and regulations:
United States Constitution:
Article I, Section 8, clause 17 29
Article VI, clause 2 29
Clean Air Act, as amended in 1970, 84 Stat. 1676 *et seq.*, 42 U.S.C. 1857 *et seq.*:
Section 101(a)(3), 42 U.S.C. 1857 (a)(3) 31
Section 107(a), 42 U.S.C. 1857c–2(a) 4

Constitution, statutes, and regulations—Con.

Clean Air Act, as amended—Continued

	Page
Section 109, 42 U.S.C. 1857c–4	19
Section 110, 42 U.S.C. 1857c–5	13, 19
Section 110(a)(1), 42 U.S.C. 1857c–5(a)(1)	5
Section 110(a)(2)(A)(i), 42 U.S.C. 1857c–5(a)(2)(A)(i)	21
Section 110(e), 42 U.S.C. 1857c–5(e)	21
Section 110(e)(1)(A), 42 U.S.C. 1857c–5(e)(1)(A)	21, 22
Section 110(e)(2)(A), 42 U.S.C. 1857c–5(e)(2)(A)	21
Section 110(f), 42 U.S.C. 1857c–5(f)	21, 22
Section 110(f)(1), 42 U.S.C. 1857c–5(f)(1)	21
Section 110(f)(1)(B), 42 U.S.C. 1857c–5(b)(1)(B)	21
Section 111, 42 U.S.C. 1857c–6	14, 18, 20, 23, 24, 27
Section 111(a)(2), 42 U.S.C. 1857c–6(a)(2)	23
Section 111(a)(3), 42 U.S.C. 1857c–6(a)(3)	23
Section 111(b)(1), 42 U.S.C. 1857c–6(b)(1)	23
Section 111(c)(1), 42 U.S.C. 1857c–6(c)(1)	23, 24
Section 112, 42 U.S.C. 1857c–7	14, 18, 20, 21, 24
Section 112(a)(1), 42 U.S.C. 1857c–7(a)(1)	24
Section 112(d)(1), 42 U.S.C. 1857c–7(d)(1)	24
Section 113, 42 U.S.C. 1857c–8	4, 25
Section 113(a)(1), 42 U.S.C. 1857c–8(a)(1)	21

Constitution, statutes, and regulations—Con.

Clean Air Act, as amended—Continued

	Page
Section 113(a)(2), 42 U.S.C. 1857c–8(a)(2)	21
Section 113(a)(2)(A), 42 U.S.C. 1857c–8(a)(2)(A)	21
Section 113(a)(3), 42 U.S.C. 1857c–8(a)(3)	21
Section 113(b)(2), 42 U.S.C. 1857c–8(b)(2)	21
Section 113(c)(1)(A), 42 U.S.C. 1857c–8(c)(1)(A)	21
Section 114(a), 42 U.S.C. 1857c–9(a)	21
Section 116, 42 U.S.C. 1857d–1	20, 21, 30
Section 118, 42 U.S.C. 1857f	passim
Section 302(e), 42 U.S.C. 1857h(e)	25
Section 304, 42 U.S.C. 1857h–2	2, 12, 14, 23, 25, 26, 27
Section 304(a)(1), 42 U.S.C. 1857h–2(a)(1)	25
Section 304(f)(1), 42 U.S.C. 1857h–2(f)(1)	19, 25, 26
Section 313(2), 42 U.S.C. 1857j–2(2)	21
Energy Reorganization Act of 1974, 88 Stat. 1233–1254	3
42 U.S.C. (1964 ed.) 1857h(e)	26
4 Kentucky Rev. Stat. 77.305 and 77.280 (1971)	7
40 C.F.R. Part 50	4
40 C.F.R. 50.1(e)	4
40 C.F.R. Part 60	23
Kentucky Air Pollution Control Commission Regulations:	
Regulation AP–1:	
Section 2(32)	8
Section 5	11

Constitution, statutes, and regulations—Con.
Kentucky Air Pollution Control Commission Regulations—Continued
Regulation AP–1—Continued

Page

Section 5(1) 2, 5, 8, 24
Section 5(2)(b) 7
Section 5(2)(c) 6, 7
Section 5(3)(a) 7
Section 5(4) 7
Regulation AP–10:
Section 2(2) 5
Section 3 6
Section 4 6
Section 4(2) 6
Section 15 6
Section 16 6
Miscellaneous:
Executive Order 11752, 38 Fed. Reg. 34793–34797 33
37 Fed. Reg. 10842, 10868–10869 5
39 Fed. Reg. 29357 5
40 Fed. Reg. 3242, 3520 3
40 Fed. Reg. 20664 ..... 32, 33
40 Fed. Reg. 20664–20665 32
40 Fed. Reg. 27925, 27928 33
40 Fed. Reg. 27928 34
Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 17
Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 207 (1967) 23
H.R. 17255, 91st Cong., 2d Sess. (1970) 27
H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. (1970) 29
H.R. Conf. Rep. No. 91–1783, 91st Cong., 2d Sess. (1970) 20, 26, 27

Miscellaneous—Continued

Page

Legislative History of the Clean Air Amendments of 1970, compiled by the Library of Congress for the Senate Committee on Public Works, Ser. No. 93–18, 93d Cong., 2d Sess. (1974) (Committee Print) 20
Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637 (1973) 25
S. Doc. No. 91–10, 91st Cong., 1st Sess. (1969) ("Air Pollution Abatement by Federal Facilities") 34
S. 4358, 91st Cong., 2d Sess. (1970) 22, 26, 27
S. Rep. No. 91–1196, 91st Cong., 2d Sess. (1970) 22, 28

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 157–169) is reported at 497 F. 2d 1172. The opinion of the district court (App. 129–149) is reported at 362 F. Supp. 360.

JURISDICTION

The judgment of the court of appeals (App. 172–173) was entered on June 5, 1974. The petition for a writ of certiorari was filed on September 3, 1974, and was granted on March 17, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 118 of the Clean Air Act, as amended in 1970, requires that federal facilities with air emission sources obtain permits from the state air pollution control commission in order to continue operating or whether Section 118 requires only that federal facilities comply with state air emission standards or limitations.

STATUTES AND REGULATION INVOLVED

Section 118 of the Clean Air Act ("the Act"), as amended in 1970, 84 Stat. 1689, 42 U.S.C. 1857f, is reproduced in petitioner's brief at page 8.

Section 304 of the Act, 84 Stat. 1706, 42 U.S.C. 1857h–2, is reproduced in petitioner's brief at pages 9–11.

Section 5(1) of Kentucky Air Pollution Control Commission Regulation AP–1 states in pertinent part:

> No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

STATEMENT

A. Petitioner's Complaint

Petitioner, the Commonwealth of Kentucky, by and through its Attorney General, brought this suit on November 16, 1972, in the United States District Court for the Western District of Kentucky against

the Environmental Protection Agency (E.P.A.), its Administrator and its Regional Director; the Department of the Army, its Chief of Staff, its Secretary, the Commanding Generals of Fort Knox and Fort Campbell and the Commanding Officer of the Lexington-Blue Grass Army Depot; the Tennessee Valley Authority (T.V.A.), the Chairman of its Board of Directors, its General Manager and the Superintendents of T.V.A.'s Shawnee Power Plant and Paradise Power Plant; the Atomic Energy Commission (A.E.C.), the Chairman of its Board of Directors, its General Manager, the Manager of the A.E.C.'s Paducah Gaseous Diffusion Plant, and Union Carbide Corporation, which operated the A.E.C.'s plant.[1] (App. 1–6, 9–14.)

Petitioner alleged that the Army, T.V.A. and A.E.C. respondents operated facilities within the state that contained air polluting equipment; that although requested to do so, these respondents had refused to apply to the Kentucky Air Pollution Control Commission for permits, as required by the Commission's regulations; that these regulations were part of the state's plan to achieve and maintain primary and secondary ambient air quality standards, which plan E.P.A. had approved pursuant to the Clean Air Act,

[1] The Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA) succeeded to the powers of the Atomic Energy Commission on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233–1254; see 40 Fed. Reg. 3242, 3520. While ERDA now has responsibility for the Paducah Gaseous Diffusion Plant, which continues to be operated by the Union Carbide Corporation under contract, in this brief we shall continue to refer to "A.E.C." respondents for the purpose of clarity.

as amended ("the Act"); and that respondents had violated Section 118 of the Act, 42 U.S.C. 1857f, which required federal facilities to comply with the state's permit regulations (App. 17–23). Petitioner further alleged that although the Administrator of E.P.A. is empowered under Section 113 of the Act, 42 U.S.C. 1857c–8, to commence appropriate action against any person who violates a state implementation plan, the Administrator had refused to do so with respect to the other respondents and that this refusal was "so arbitrary, capricious, unlawful, and unwarranted as to deprive the citizens of [Kentucky], due process and equal protection of the law * * *" (App. 25).

B. The Background of Petitioner's Complaint

The background of petitioner's complaint is as follows. The Clean Air Act Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," but recognized that each state had "the primary responsibility for assuring air quality within the entire geographic area comprising such State." Section 107(a) of the Act, 42 U.S.C. 1857c–2(a). *Train* v. *Natural Resources Defense Council,* No. 73–1742, decided April 16, 1975, slip op. at 2. Pursuant to the Act, the Administrator of the Environmental Protection Agency established national primary and secondary standards for "ambient air"[2] and the state submitted plans to E.P.A. designed to implement and maintain these standards within their respective boundaries, as required by Section 110(a)(1) of the Act, 42 U.S.C. 1857c–5(a)(1).

[2] "Ambient air" is "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. 50.1(e). See generally 40 C.F.R. Part 50.

1. The Regulations of the Kentucky Air Pollution Control Commission Relating to Operating Permits

The Commonwealth of Kentucky submitted its implementation plan to E.P.A. and the Administrator approved portions of the plan, while disapproving others. 37 Fed. Reg. 10842, 10868–10869.[3] Relevant here are the approved Kentucky regulations embodied in the plan that relate to the granting of an operating permit, which the state defines as "the permission, in whatever form given, of the [Kentucky Air Pollution Control] Commission to construct, alter, use, operate, or maintain an air contaminant source."[4]

Kentucky Air Pollution Control Commission Regulation No. AP–1, Section 5(1), effective April 9, 1972, provides as follows (Pet. App. 46a):

> No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned →

[3] The United States Court of Appeals later vacated the Administrator's approval of Kentucky's plan on the ground that interested parties were not given an opportunity to participate in the Administrator's consideration of the plan. *Buckeye Power, Inc.* v. *Environmental Protection Agency,* 481 F. 2d 162 (C.A 6).

Kentucky thereafter resubmitted its plan and the Administrator approved it on August 15, 1974. 39 Fed. Reg. 29357.

[4] Kentucky Air Pollution Control Commission Regulation No. AP–10, Section 2(2). (This regulation is set forth at page 209 of petitioner's appendix in the court of appeals (hereafter "A.").)

> by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

The permit application must be on a form provided by the state Commission and must contain certain information "when specifically requested by the Commission," including an "analysis of the characteristics, properties, and volume of the air contaminants based upon source or stack samples of the air contaminants taken under normal operating conditions." [5]

Each application for a permit is reviewed by the Executive Secretary of the Air Pollution Commission, who either grants or denies the application.[6] Prior to taking such action the Executive Secretary is required to direct the holding of a formal hearing upon the request of the applicant; a hearing may also be held at the Executive Secretary's own request.[7] Also, the "Executive Secretary will direct the holding of a formal hearing upon receipt of a written request therefor from the applicant or intervenor filed within thirty (30) days after the grant or denial of a permit." [8] Any person "whose interests may be affected by a proceeding" may file a petition to intervene; if the petition is granted, the intervenor becomes a party for all purposes.[9]

[5] Section 5(2)(c) of the Kentucky Air Pollution Control Commission Regulation AP-1 (A. 120); Regulation AP-10, Section 3 (A. 210).

[6] Regulation AP-10, Sections 3 and 4 (A. 210).

[7] Regulation AP-10, Section 4(2) (A. 210).

[8] Regulation AP-10, Section 4(2) (A. 210).

[9] Regulation AP-10, Sections 15 and 16 (A. 216-217).

A permit application will be denied if the applicant has failed to supply "information required or deemed necessary by the Commission to enable it to act upon the permit application." [10] A permit to construct or operate will likewise be denied when "the air contaminant source will prevent or interfere with the attainment or maintenance of state or federal air quality standards." [11] If the permit is granted, it is "subject to such terms and conditions set forth and embodied in the permit as the Commission shall deem necessary to insure compliance with its standards." [12]

Upon denial of an application for a permit after a hearing, the applicant apparently may seek judicial review by maintaining "a special proceeding in equity in the circuit court of the county"; the applicant is entitled to a trial *de novo* and may appeal any adverse decision to the Court of Appeals of Kentucky. 4 Kentucky Rev. Stat. 77.305 and 77.280 (1971).

2. THE RESPONSE OF THE FEDERAL FACILITIES TO THE STATE COMMISSION'S REQUEST THAT THEY APPLY FOR STATE PERMITS

The Kentucky Air Pollution Commission apparently believed that its permit regulations applied to federal facilities, although it is not obvious on the face of the regulations that such facilities are included.[13] In the summer of 1972, shortly after Kentucky's implementation plan became effective, an of-

[10] Regulation AP-1, Section 5(2)(c) (A. 120).

[11] Regulation AP-1, Section 5(3)(a) (A. 121).

[12] Regulation AP-1, Section 5(4) (A. 121).

[13] The regulations do not specifically mention federal facilities and Section 5(2)(b) of Regulation AP-1, which sets forth the

ficial of the state's Air Pollution Control Commission wrote to the Army, T.V.A. and A.E.C. respondents requesting them to submit permit applications to the Commission in regard to their facilities within the state (App. 35–59). These federal facilities included the United States Army Armor Center and Fort Knox, the Lexington-Bluegrass Army Depot, and Fort Campbell (headquarters of the 101st Airborne Division); the A.E.C.'s Gaseous Diffusion Plant, Paducah, Kentucky, which is one of three production facilities of the United States operated to supply the national need for enriched uranium (App. 92); and the T.V.A.'s Shawnee Power Plant and Paradise Power Plant (App. 129 n. 1).

The Army, T.V.A. and A.E.C. respondents replied to these requests by stating that federal facilities located within Kentucky were not required to apply to the state's Air Pollution Control Commission for an operating permit (App. 37–79). However, respondents expressed their desire to cooperate fully with the

---

procedures for submitting permit applications, does not clearly cover facilities of the federal government (A. 120):

> Applications for permits shall be signed by the corporate President, his authorized agent; or by an equivalently responsible officer in the case of organizations other than corporations; or, in other cases, by the source owner or operator; or, in the case of political subdivisions, by the highest elected official of such subdivision. Such signature shall constitute personal affirmation that the statements made in the application are true and complete.

Section 5(1), however, seems broad enough to include federal installations since it requires each "person" to obtain a permit and person is defined by Section 2(32) of Regulation AP-1 (A. 111) to include any "government agency."

Commission in the implementation of the Kentucky plan to abate air pollution.

Thus, for example, the Commanding Officer of the Lexington-Blue Grass Army Depot, in his letter to the state Commission, described the steps taken by the depot to abate air pollution and extended the following invitation: "representatives from state and local environmental pollution control agencies may visit our facilities, may examine operating records and may conduct tests provided security restrictions are met and the visitors are accompanied by applicable representatives designated by Headquarters, US Army Materiel Command, Washington, D.C." (App. 44–45). The Commanding Officer of Fort Campbell stated his desire "to cooperate in every way possible with [the Commission]," "enclosed * * * pertinent information on [the Fort's] heating plants which appear to be covered by [the Commission's] regulations," and requested the Commission to inform him "if any further information is desired" (App. 48).

Similarly, the T.V.A., although declining to apply formally for operating permits, supplied the Commission "with the same emission data and other information for TVA's Paradise and Shawnee power plants which [the Commission's] permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations" (App. 52; A. 369–518).

The A.E.C. likewise supplied to the state Commission the information and data requested on the permit application form and stated that although it was not bound to apply for an operating permit, it shared

588-671—75——3

"with the State a deep interest in preventing and abating both air and water pollution problems and [was] happy to cooperate as a matter of comity with the Kentucky Air Pollution Control Commission" (App. 37–38).

3.THE ADVICE GIVEN TO FEDERAL FACILITIES BY THE ENVIRONMENTAL PROTECTION AGENCY

On October 17, 1972, after further exchanges of correspondence between respondents and the state Commission, the Regional Administrator of E.P.A. sent a letter to all federal facilities in the region, including those operated by respondents, and to the Director of the Kentucky Air Pollution Control Commission (App. 55–59, 79–82). This letter set forth the policy of E.P.A. and its interpretation of Section 118 of the Act, 42 U.S.C. 1857f, which the state Commission had invoked as the basis for requiring respondents to apply for operating permits. The E.P.A. Regional Administrator stated that Section 118 required federal facilities "to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans" (App. 57). Also, each federal facility should develop a compliance schedule and should provide data requested by the state so long as the request is "reasonable and specific" (*id.* at 58). "However," the letter concluded, E.P.A. does "not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit applica-

tion that will lead automatically to issuance of a state permit or license" (*ibid.*).[14]

C. THE PROCEEDINGS BELOW

One month later, petitioner instituted this action seeking, *inter alia,* a mandatory injunction against the Army, T.V.A. and A.E.C. respondents to compel them to apply for operating permits pursuant to Section 5 of the Kentucky Air Pollution Control Commission's Regulation AP-1 (App. 31).[15] On cross-motions for summary judgment, the district court ruled in favor of respondents and ordered petitioner's action dismissed (Pet. App. 1a–21a), holding that the language in Section 118 of the Act, 47 U.S.C. 1857f, which instructs federal facilities of the executive, legislative and judicial branches to comply with state "requirements respecting control and abatement of air pollution," refers only to the applicable state and local emission standards and compliance schedules (*id.* at 4a–9a).

The court of appeals affirmed. Reading the language of Section 118 in light of other provisions of the Clean

[14] The E.P.A. Regional Administrator's letter and the interpretation of Section 118 of the Act embodied therein followed the interpretation given that provision by the E.P.A. Administrator in his instructions to all regional administrators in 1972.

[15] The Chairman of the State Commission advised the General Manager of T.V.A. that "[t]his action [the suit] was taken independent of the Commission, and the decision of whether or not to pursue a formal legal action on this matter is now obviously out of our hands. I regret that such action has been taken before the benefit of your response to our earlier inquiry" (App. 77). (The district court held that the state Attorney General could sue without a request from the Commission although "the matter is not free from doubt" (Pet. App. 19a).)

Air Act, as amended in 1970, including Section 304 (42 U.S.C. 1857h–2), which allows enforcement suits to be brought against the federal government, and in light of the legislative history of Section 118 and its purposes, the appellate court concluded that (Pet. App. 33a–34a):

> We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end. The national dedication to improvement of the environment by prevention and control of air pollution is in no way impeded by exempting federal agencies from the permit requirement of Administrative Regulation No. AP–1, § 5.

In reaching its conclusion, the appellate court also noted that the Supremacy Clause of the Constitution and the doctrine of sovereign immunity were involved since a holding that federal facilities must obtain state permits in order to operate would be so marked a departure from established principles of federalism that a court should not lightly infer that Congress intended this result (*id.* at 29a–30a).

In *State of Alabama* v. *Seeber,* 502 F.2d 1238 (C.A. 5), petition for a writ of certiorari pending, *sub nom. Seeber* v. *Alabama,* No. 74–851, another court of appeals, with one judge dissenting, reached the opposite conclusion, holding that the language of Section 118

indicated that Congress intended federal facilities to comply with state permit regulations and that any contrary implications in other provisions of the Act and Section 118's legislative history were ambiguous.

SUMMARY OF ARGUMENT

Both petitioner and respondents agree that under Section 118 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857f, federal facilities must comply with state air pollution emission standards or limitations and compliance schedules. Focusing on the Section 118 phrase "requirements respecting control and abatement of air pollution," petitioner argues further that federal facilities must seek and obtain operating permits from the state air pollution control commission. In our view, however, the term "requirements" in Section 118 refers only to emission standards or limitations, which the Act defines to include compliance schedules, and does not comprehend state permit procedures.

The term "requirements" is nowhere defined in the Act. However, it is used in various sections throughout the Act, including the provision that authorizes extensions of time in order to meet "requirements" of state implementation plans because the technology needed for compliance is unavailable. 42 U.S.C. 1857c–5. In context, this reference to "requirements" comprehends emission standards or limitations, not state permit procedures, and recently this Court so assumed when it discussed the provision in *Train* v. *Natural Resources Defense Council, supra.*

Moreover, in another section the Senate bill, from

which Section 118 is substantially derived, clearly distinguished between emission "requirements" and "permit" procedures in setting forth the provisions that should be contained in an acceptable state plan for implementing and maintaining national air quality standards. This distinction is of course entirely consistent with our reading of the present Section 118.

In two sections of the Act dealing with new stationary sources and hazardous pollutants, which were added by the 1970 amendments, Congress specifically referred to state "procedures" for implementing standards set by the E.P.A. Administrator. Yet in both instances Congress expressly provided that such state implementation procedures (as distinguished from emission standards or limitations) could not be applied to federal facilities. 42 U.S.C. 1857c–6, 1857c–7.

Most significantly, Section 304, which authorizes states to sue to enforce provisions of their implementation plans against federal facilities, provides for such suits only in regard to violations of emission standards or limitations. 42 U.S.C. 1857h–2. As revealed by an examination of the Senate version of Section 118 and the changes made by the Conference Committee in it and in Section 304, one of Congress' purposes in enacting Section 304 was to give the states a mechanism for enforcing Section 119. Therefore, the term "requirements" in Section 118 cannot be read to include state permit procedures since it would be unreasonable to believe that Congress imposed upon federal facilities a duty to obtain such permits and yet completely neglected to furnish the states with any enforcement tool to assure that federal facilities fulfill that duty.

B

The legislative history of Section 118 reveals that, with respect to federal facilities, both the House and the Senate had passed bills to require more stringent air pollution control and abatement. While the House version of Section 118 spoke in terms of federal facilities complying with state emission "standards," the Senate version used the term "requirements." But the Conference Committee, when it consolidated the House and Senate versions to produce the present Section 118, perceived no difference between the two and stated in its report that both required compliance with state emission standards. This is hardly surprising since the Senate report on the bill described its proposed Section 118 as requiring federal facilities to meet state "emission standards."

On the other hand, if petitioner's interpretation of Section 118 were correct, there would have been a significant disagreement between the House bill, which referred to "emission standards," and the Senate amendments, which referred to "requirements." Yet such a disagreement was in no way mentioned by the Conference Committee. That in itself would be surprising, but the Conference Committee's silence on the point would be all the more remarkable in light of the fact that the interpretation petitioner urges is such a sharp break with tradition, as embodied in two centuries of decisions by this Court making clear that unless Congress clearly provides otherwise, the states have no power to require federal agencies to obtain state licenses in order to conduct activities within state borders.

Moreover, as the Act provides, it is generally the states' responsibility to control air pollution from emission sources within their jurisdiction; one of the ways a state may choose to do this is through a permit program. Yet the Conference Committee report explicitly states that in regard to federal facilities it is the President's responsibility to assure that emission limitations and standards are met. This indicates still further that federal facilities are not required to obtain state operating permits.

C

The E.P.A. Administrator is charged with the duty of administering the Clean Air Act and his interpretation of the Act is entitled to great weight, as the Court recently held in *Train* v. *Natural Resources Defense Council, supra.* In regard to Section 118, the E.P.A.'s interpretation is that federal facilities are not required to obtain state operating permits; prior to the filing of this suit, E.P.A. so advised all federal agencies in Kentucky, including respondents in this case.

In addition, the President has the responsibility for assuring compliance by federal facilities with Section 118 and, in an Executive Order, the President, too, has interpreted that section as not subjecting such facilities to state permit procedures.

E.P.A. recently promulgated rules to implement the President's Executive Order with respect to air pollution by federal facilities. These E.P.A. rules set forth detailed reporting, monitoring and compliance procedures. Whether another system of assuring federal compliance, such as requiring federal facilities to

obtain state permits, is desirable, is a matter for Congress to decide. The Administrative Conference of the United States recently recommended that rather than subjecting federal facilities to state permit procedures, the most appropriate course is to vest control and authority over all aspects of environmental pollution by the federal government in a single federal agency, which should consider the need for setting up a federal permit program. The wisdom of this proposal is likewise ultimately for Congress to decide.

ARGUMENT

Section 118 of the Clean Air Act, as Amended in 1970, Does Not Require Federal Facilities To Seek and Obtain State Air Pollution Control Permits in Order To Operate Within the State

In this case the Court has the task of resolving—in Mr. Justice Frankfurter's words—a "contest between probabilities of meaning"[16] of Section 118 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857f, which provides in full:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency,

[16] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947).

or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

Petitioner argues that the language in the first sentence of Section 118—"shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements"—means that facilities of the executive, legislative and judicial branches of the federal government must comply not only with state emission standards and compliance schedules, but also with state procedures that demand that emission sources—including federal facilities—obtain operating permits (Pet. Br. 18–39).

We contend, however, that the phrase means only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable emission standards and compliance schedules [17] promulgated by the particular state pursuant to their E.P.A.-aproved plan to establish and maintain national air quality standards. See Sections 109 and 110 of the Act, 42 U.S.C. 1857c–4 and 1857c–5.

Petitioner, stressing the words "requirements respecting control and abatement of air pollution" in Section 118, asserts that it is "clear and unambiguous" that state permit procedures are comprehended, so much so that it is unnecessary for the Court to look beyond this particular language (Pet. Br. 26–27). But despite petitioner's insistence on the "plain meaning" of Section 118 (*id.* 16, 23, 26–27), that provision cannot be considered in isolation; language gains meaning from its context and an important part of that context is the statute as a whole and the history that preceded it. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543–544; see also *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41, 48; *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250; *Cass* v. *United States*, 417 U.S. 72, 77–79.

As we discuss below, in light of other provisions of the Clean Air Amendments of 1970 and the relevant

---

[17] Under Section 304(f)(1), 42 U.S.C. 1857h-2(f)(1), "emission standard or limitation" means "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard."

legislative history, the meaning of the phrase petitioner emphasizes is hardly a clear command that federal facilities must seek state operating permits. Indeed, a fair reading of the statute as a whole leads, we believe, to the firm conclusion that federal facilities need not obtain state permits in order to operate. This is the conclusion reached by E.P.A. in 1972 and by the President in the Executive Order implementing Section 118.

A. WHEN READ IN VIEW OF THE ACT AS A WHOLE, THE LANGUAGE IN SECTION 118 DIRECTING FEDERAL FACILITIES TO COMPLY WITH STATE AIR POLLUTION "REQUIREMENTS" MEANS ONLY THAT SUCH FACILITIES MUST MEET STATE EMISSION STANDARDS OR LIMITATIONS

Neither the word "requirements" in Section 118 nor the phrase "requirements respecting control and abatement of air pollution" are defined in the Act. The phrase itself, however, is used in Section 116 of the Act, 42 U.S.C. 1857d–1, which provides in part that states retain authority to "adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) *any requirement respecting control or abatement of air pollution*" (emphasis added).[18] As it appears in Section 116, the italicized

[18] Section 116 continues with an exception that has the effect of forbidding states from imposing emission standards that are less stringent than those in effect in an applicable implementation plan or under Sections 111 or 112, 42 U.S.C. 1857c–6 and 1857c–7.

Section 116 was added by the Conference Committee. See H.R. Rep. No. 91–1783, 91st Cong., 2d Sess. 48 (1970). (The Legislative History of the Clean Air Amendments of 1970 is compiled in two volumes by the Library of Congress for the Senate Committee on Public Works, Ser. No. 93–18, 93d Cong., 2d Sess. (1974).)

phrase obviously does not refer to emission standards; yet the one area of agreement between the parties in this case is that the same phrase, as used in Section 118, does refer to such standards. Section 116 thus offers little guidance on the meaning of Section 118.

As to the term "requirements" in Section 118, this also appears in other sections of the Act[19] and, as this Court has reminded, the "connotation of a term in one portion of an Act may often be clarified by reference to its use in others." *United States* v. *Cooper Corp.*, 312 U.S. 600, 606. Section 110(e)(1)(A), for instance, authorizes the E.P.A. Administrator to extend for two years a state's three-year deadline for attaining a national primary air quality standard[20] if he determines, upon timely application by the state's Governor, that an emission source is unable to meet "the *requirements* of such plan which implement such primary standard because the necessary technology" is unavailable (emphasis added). As used in Section 110(e)(1)(A), "requirements" rather plainly refers to emission standards and compliance schedules; it just as clearly does not refer to state procedures for obtaining a permit, which scarcely demand technological sophistication.

[19] *E.g.*, Section 110(e)(1)(A), 110(e)(2)(A), 110(f)(1), 110(f)(1)(B), 42 U.S.C. 1857c-5(e)—1857c–5(f); Section 113(a)(1), 113(a)(2), 113(a)(2)(A), 113(a)(3), 113(b)(2), 113(c)(1)(A), 42 U.S.C. 1857c–8(a)—1857c–8(c); Section 114(a), 42 U.S.C. 1857c–9(a); Section 313(2), 42 U.S.C. 1857j–2(2).

[20] Section 110(a)(2)(A)(i), 42 U.S.C. 1857c–5(a)(2)(A)(i), discussed in *Train* v. *Natural Resources Defense Council*, *supra*, slip op. at 22–23.

Accordingly, when the Court recently discussed Section 110(e)(1)(A) in *Train* v. *Natural Resources Defense Council, supra,* slip op. at 22–24, it treated the two-year extension for complying with implementation plan "requirements" as dealing with emission limitations.[21] And this definition of "requirements" as used in Section 110(e)(1)(A) is, of course, the same meaning we contend the term has in Section 118.

Moreover, in listing the necessary aspects of state implementation plans, the Senate bill[22] from which Section 118 is substantially derived, as we later discuss, distinguished between "emission *requirements*" and compliance schedules, on the one hand, and "appropriate procedures, including, but not limited to * * * *permits*" for the operation of the emission source,[23] on the other hand. Again, this is entirely consistent with our reading of Section 118 that it imposes the obligation on federal facilities to meet state emission standards but does not impose the duty to obtain state operating permits.

Thus far we have attempted to adhere to Mr. Justice Cardozo's instruction that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to

[21] See also the Court's treatment of Section 110(f), 42 U.S.C. 1857c–5(f), which concerns postponements for meeting "requirements." Slip op. at, *e.g.*, 21.

[22] S. 4358, 91st Cong., 2d Sess. (1970).

[23] Compare *id.* Section 111(a)(2)(B) with *id.* Section 111(a)(2)(D) (emphasis added). The Senate report made a similar distinction. S. Rep. No. 91–1196, 91st Cong., 2d Sess. 12 (1970).

the end in view."[24] Our interpretation of Section 118 is, we believe, supported by the provisions of the Act we have considered to this point. There are still other sections of the Act that confirm our view, but before turning to these we should add a word about the language in Section 118 that directs federal facilities to comply with state air pollution requirements "to the same extent that any person is subject to such requirements." Despite petitioner's assertions to the contrary (Brief 20, 34–35), the quoted phrase is of scant assistance in determining what Congress meant by "requirements": it tells only to what extent federal facilities must comply with the applicable state provisions but does not say which state provisions are applicable.

As to the other sections of the Clean Air Act, as amended in 1970, that are pertinent here, the most prominent are Section 111, 112 and Section 304.[25] Section 111 deals with standards of performance for "new stationary sources," that is, buildings or other facilities that are constructed or modified after a certain time.[26] For such new sources, the E.P.A. Administrator was to promulgate regulations setting standards of performance,[27] but under Section 111(c)(1) the states could develop their own "procedure" for

[24] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 439 (dissenting). See also *Duparquet Co.* v. *Evans*, 297 U.S. 216, 218; *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, No. 73–1380, decided March 3, 1975, slip op. 7–8, and cases there cited; Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 207 (1967).

[25] 42 U.S.C. 1857c–6, 1857c–7, 1857h–2.

[26] See Section 111(a)(2), 111(a)(3), 111(b)(1), 42 U.S.C 1857c–6(a)(2)–1857c–6(b).

[27] As he did. See 40 C.F.R. Part 60.

implementation and enforcement. If the Administrator finds the state "procedure" adequate, he may delegate his authority to the state *"except with respect to new sources owned or operated by the United States." Ibid.* (emphasis added). This exception in Section 111 confirms that although Congress intended all federal facilities to meet state emission standards, it did not intend to make such facilities submit to state permit procedures—which is, of course, our view of Section 118.[28]

Similarly, Section 112 deals with national emission standards for hazardous air pollutants [29] and like Section 111 allows the states to develop their own "procedure" for implementing and enforcing standards promulgated by the E.P.A. Administrator. But again, when Congress had the opportunity to subject federal facilities to such state implementation procedures, it excluded "stationary sources owned or operated by the United States." Section 112(d)(1), 42 U.S.C. 1857c–7(d)(1).

Finally, Section 304 of the Act, 42 U.S.C. 1857h–2, indicates still further that federal facilities are not

[28] While no "new stationary sources" of the federal government are directly involved in this case, we should point out that Section 5(1) of the Kentucky regulations (see pp. 5–6, *supra*) requires a permit before any emission source can be constructed or modified; under Section 111(e)(1) of the Act this portion of the permit regulation is plainly inapplicable to new federal sources and illustrates further why the term "requirements" in Section 118 cannot be read to include any provision in a state implementation plan that applies to non-federal facilities.

[29] Defined as air pollutants to which no ambient air quality standard is applicable and which may cause an increase in mortality or "serious irreversible, or incapacitating reversible, illness." Section 112(a)(1), 42 U.S.C. 1857c–7(a)(1).

subject to state permit procedures. Section 304(a)(1) allows "any person" to commence an action against the United States in federal court to enforce "an emission standard or limitation under this Act" or an order issued by the state or the E.P.A. Administrator "with respect to such a standard or limitation." Section 304 is the sole mechanism in the Act for states to remedy non-compliance by federal facilities with Section 118.[30]

In defining the "emission standards or limitations" that can be enforced under Section 304, Congress specifically referred to Section 118 "requirements." [31] And Congress also provided that a Section 304 suit may be brought by "any person," which is defined to include a state or a political subdivision of a state.[32]

Indeed, that Congress intended the states to utilize Section 304 to enforce Section 118 [33] is illustrated by the fact that the Senate's version of Section 118, which was substantially enacted, contained a subsection pro-

[30] Section 113, 42 U.S.C. 1857c–8, authorizes the E.P.A. Administrator to take enforcement action against violators. Also, the states are not precluded from utilizing actions in state courts to enforce their implementation plans.

[31] Section 304(f)(1), 42 U.S.C. 1857h–2(f)(1) (emphasis added):

> For purposes of this section, the term "emission standard or limitation under this Act" means—
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, * * *
> * * * * * *
> which is in effect under this Act (*including a requirement applicable by reason of section 118*) or under an applicable implementation plan.

[32] Section 302(e), 42 U.S.C. 1857h(e).

[33] See Luneburg, *Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C. Ind. & Com. L. Rev. 637, 663 (1973), reaching the same conclusion.

viding that the "Governor, the attorney general or any citizen of any State in which any Federal property, facility, or activity is located may seek to enforce the provisions of this section [Section 118] pursuant to section 304 of this Act." [34] The Conference Committee [35] eliminated this subsection without comment but retained in its stead the provision from the Clean Air Act of 1963 defining "person" to include a state [36] and added the parenthetical phrase in Section 304(f)(1), quoted in note 31, *supra,* making clear that Section 118 was to be enforced through a Section 304 suit.[37]

Since there is no room for doubt that one of the purposes of Section 304 was to give the states the means to enforce Section 118 in federal court against federal facilities, it is highly significant that the enforceable Section 118 "requirements respecting control and abatement of air pollution" are emission standards or limitations and orders regarding them, not state procedural regulations requiring operating permits. Section 304 thus plainly indicates, as the court below held (Pet. App. 29a), that Congress believed Section 118 demanded only that federal facilities comply with such state standards or limitations. Section 118 thus could not have been intended to require

[34] S. 4358, 91st Cong., 2d Sess. (1970) (Sec. 7).

[35] H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970).

[36] 42 U.S.C. (1964 ed.) 1857h(e).

[37] Petitioner, as did the court in *Alabama* v. *Seeber*, *supra*, 502 F. 2d at 1248, seems to suggest that Section 304 is inapposite because it has as its caption "Citizen Suits." But the heading "cannot be used to extend or to restrain any positive provisions contained in the body of the act." *Hadden* v. *The Collector*, 5 Wall. 107, 111; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26.

federal facilities to obtain state permits, as petitioner contends. There is, we submit, simply no reasonable explanation why Congress would have decided to impose such a duty on federal facilities and yet at the same time refuse to provide the states with a Section 304 remedy for noncompliance.

B. THE LEGISLATIVE HISTORY OF SECTION 118 CONFIRMS THAT CONGRESS DID NOT INTEND TO ALTER THE TRADITIONAL FEDERAL-STATE RELATIONSHIP BY REQUIRING FEDERAL FACILITIES TO OBTAIN STATE OPERATING PERMITS

If there remains any degree of doubt about the proper interpretation of Section 118, even this is removed upon examination of the legislative history of that provision. Both the House bill [38] and the Senate amendment,[39] which resulted in the Clean Air Amendments of 1970, contained provisions to strengthen the strictures against air pollution by federal facilities. After considering both versions, the Conference Committee, in its report, stated the following in regard to the final version of Section 118: [40]

> The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions.

[38] H.R. 17255, 91st Cong., 2d Sess. (1970) (Sec. 10, amending Section 111 of the Clean Air Act of 1963).

[39] S. 4358, 91st Cong., 2d Sess. (1970) (Sec. 7, amending Section 111 of the Clean Air Act of 1963 (42 U.S.C. 1857f), redesignated as Section 118).

[40] H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. 48 (1970).

> The conference substitute modifies the House provision to require that the President rather than the Administrator be responsible for assuring compliance by Federal agencies.

Two things are important about the Conference Committee's statement.

1. First, the Conference Committee, in describing the effect of the House and Senate versions of Section 118, stated that there was agreement that federal facilities must comply with applicable emission standards and limitations, which is, of course, our interpretation of Section 118. In regard to what this provision would demand of federal facilities, the Conference Committee significantly indicated no area of disagreement between the House and Senate.

The Senate version contained language which is similar to that now embodied in Section 118: federal facilities "shall comply with the requirements of this Act in the same manner as any person must so comply in the administration of such property, facility, or activity."[41] In its Report, the Senate described the effect and purpose of this language as follows: "This section [118] requires that Federal facilities meet the *emission standards* necessary to achieve ambient air quality standards as well as those established in other sections of Title I." S. Rep. No. 91–1196, 91st Cong., 2d Sess. 23 (1970) (emphasis added).

The House version, which is also reflected in the present Section 118, provided as follows: federal facil-

[41] See note 39, *supra*.

ities "shall comply with applicable Federal, State, interstate, and local emission standards * * *."[42] The House Report stated that this would "direct Federal agencies in the executive, legislative, and judicial branches to comply with applicable Federal, State, interstate, and local *emission standards.*" H.R. Rep. No. 91–1146, 91st Cong., 2d Sess. 14–15 (1970) (emphasis added).

Thus, although the Senate version spoke in terms of "requirements," as the final Section 118 does, while the House version talked of "emission standards," it is hardly surprising that the Conference Committee perceived no difference between the two;[43] in formulating what became Section 118, the Committee therefore simply combined the House and Senate provisions.

If the Conference Committee had thought that the Senate amendment and its use of the term "requirements" would subject federal facilities to state permit procedures, while the House bill would not, it is difficult to imagine why the Committee would not have alluded to this, particularly in light of the Supremacy Clause of the Constitution[44] and two centuries of precedent holding that states have no power to require

[42] See note 38, *supra*.

[43] Moreover, it was quite logical for the Conference Committee to read the term "requirements" in the Senate amendment as equivalent to emission standards since, as we discussed earlier (p. 22, *supra*), the Senate used "emission requirement" and "emission standard" interchangeably throughout its entire bill.

[44] Article VI, clause 2. See also Article I, sec. 8, cl. 17, in regard to exclusive federal jurisdiction over forts, arsenals and other federal buildings within states.

licenses for federal activities to be conducted within their borders. See *McCulloch* v. *Maryland,* 4 Wheat. 316; *Ohio* v. *Thomas,* 173 U.S. 276; *Johnson* v. *Maryland,* 254 U.S. 51 (state has no power to require federal employee driving on the state's roads to obtain a state license); *Arizona* v. *California,* 283 U.S. 423, 451; *Mayo* v. *United States,* 319 U.S. 441; *Federal Power Commission* v. *Oregon,* 349 U.S. 435; *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187. Indeed, this Court recently affirmed a decision of a court of appeals holding that a state pollution control agency could not regulate, through a permit system, radioactive discharges (both air and water) from an A.E.C.-regulated nuclear power plant. *Northern States Power Co.* v. *Minnesota,* 447 F. 2d 1143 (C.A. 8), affirmed, 405 U.S. 1035.[45]

2. The second point of importance in the quoted statement of the Conference Committee report is that the Committee made the President responsible for assuring compliance by federal facilities with Section 118. This is still another indication that Congress did not contemplate requiring federal facilities to obtain state operating permits. In regard to non-federal facilities, the states have the responsibility for assuring compliance, and the Act specifically so provides;[46] the

[45] It is therefore well-established, as the cases cited illustrate, that state regulations or laws cannot, of their own force, require federal facilities to obtain permits in order to operate within the state; the states may exercise such authority only if Section 118 of the Act authorizes it. In this regard, Section 116 of the Act, 42 U.S.C. 1857d-1, provides only that the states retain whatever authority for controlling air pollution they otherwise would have.

[46] Section 101(a)(3), 42 U.S.C. 1857(a)(3).

states, of course, may fulfill this responsibility by devising permit procedures, as Kentucky has done. But in regard to federal facilities, state permits are not required and the President has the primary duty to ensure compliance, as the Conference Committee stated.

In sum, the legislative history of Section 118 confirms our view of the meaning of the statute and this, together with the analysis of the other provisions of the Act set forth above, leads to the firm conclusion that under Section 118 federal facilities are obliged only to comply with applicable state emission standards and limitations.

C. BOTH THE ENVIRONMENTAL PROTECTION AGENCY, WHICH IS CHARGED WITH THE ADMINISTRATION OF THE ACT, AND THE PRESIDENT, WHO IS RESPONSIBLE FOR ASSURING COMPLIANCE BY FEDERAL FACILITIES WITH SECTION 118, HAVE INTERPRETED THAT PROVISION TO MEAN ONLY THAT SUCH FACILITIES MUST MEET STATE EMISSION STANDARDS AND LIMITATIONS AND THIS INTERPRETATION IS ENTITLED TO GREAT WEIGHT

As the statement of facts in this case indicates (pp. 10–11, *supra*), in 1972 E.P.A. stated its view, before petitioner filed suit, that federal facilities were not required to obtain state operating permits and the E.P.A. Regional Administrator so advised all federal facilities in his region, including those involved in this case. (See also the 1973 letter from the E.P.A. Administrator, App. 84.) E.P.A has continued to adhere to this interpretation of Section 118.

On May 6, 1975, the E.P.A. Administrator published in the Federal Register a detailed set of guidelines for federal facilities in order "to determine the compliance status of all Federal stationary sources of air pollutants which are subject to Federal, State, and local emission limitations and establish firm public commitments to abate emissions as expeditiously as practical from those facilities exceeding limitations." [47] The E.P.A. Administrator, stating that Section 118 of the Act required federal facilities to meet state emission standards, directed federal facilities to supply to E.P.A. and state air pollution commissions various emission data; the Administrator also set up a detailed procedure for ensuring compliance with Section 118 through specific timetables which E.P.A. and the state agencies will monitor.[48]

As in *Train* v. *Natural Resources Defense Council, supra,* slip op. 25, the interpretation by E.P.A. of Section 118 is entitled to great weight; E.P.A. is "charged with the administration of the Act" and, we submit, its interpretation is not only reasonable, but also correct in light of the Act as a whole and the history surrounding it. See also *Udall* v. *Tallman,* 380 U.S. 1, 16–18.

Moreover, as the Conference Committee report stated, the Act gives the President the responsibility of ensuring that federal facilities comply with Section 118. On December 19, 1973, the President issued

[47] 40 Fed. Reg. 20664.

[48] *Id.* at 20664–20665.

Executive Order 11752 [49] concerning the prevention, control and abatement of environmental pollution at federal facilities. After stating that the Clean Air Act and other statutes required federal facilities to comply with state substantive standards and limitations regarding pollution, the Executive Order—agreeing with the earlier interpretation of Section 118 by E.P.A.—made clear that in "light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control." [50]

Moreover, the Administrative Conference of the United States has spoken to the issue in this case and has recently recommended to the President, the Congress, and the Judicial Conference of the United States various procedures for ensuring compliance by federal facilities with environmental quality standards.[51] In the view of the Administrative Conference, the Clean Air Act requires "agencies with control over federal facilities to comply with both federal and non-federal pollution control standards," but the Act does not "specifically authorize procedures for [its] enforcement where federal facilities are concerned." [52] Since according to the Administrative Conference even a decision by this Court in favor of petitioner "will

[49] 38 Fed. Reg. 34793–34797.

[50] *Id.* at 34793. The E.P.A. guidelines issued on May 6, 1975, implement Executive Order 11752. See 40 Fed. Reg. 20664.

[51] 40 Fed. Reg. 27925, 27928 (July 2, 1975).

[52] *Id.* at 27928.

leave substantial procedural problems,"[53] the Conference has proposed amending the Act to vest the responsibility for developing procedures in a single federal agency which "should consider the use of emission control permits where they are not now employed." 40 Fed. Reg. at 27928.

In sum, in light of the wording of Section 118, the other provisions of the Clean Air Amendments of 1970, the legislative history of that section, the amendments as a whole, and the interpretation by E.P.A. and the President, we submit that federal facilities are not required by Section 118 to seek and obtain state operating permits. If a contrary result is thought desirable, although the Administrative Conference has proposed otherwise, this is a matter for Congress. Indeed, we are informed that the Subcommittee on Health and Environment of the House Committee on Commerce is now considering whether Section 118 should be amended to subject federal facilities to state permit procedures.

---

[53] *Ibid.* The Administrative Conference points out that there are more than "20,000 [federal] facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans' hospitals to individual fish hatcheries, Coast Guard stations and research laboratories." *Ibid.* (For a listing of the different kinds of federal facilities and their locations, see S. Doc. No. 91-10, 91st Cong., 1st Sess (1969) ("Air Pollution Abatement by Federal Facilities").)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General,
WALLACE H. JOHNSON,
Assistant Attorney General,
A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General,
JACQUES B. GELIN,
ROBERT L. KLARQUIST,
Attorneys,
Department of Justice.
ROBERT H. MARQUIS,
General Cousel,
Tennessee Valley Authority.
HERBERT S. SANGER, JR.,
Deputy General Counsel,
BEAUCHAMP B. BROGAN,
Associate General Counsel,
Tennessee Valley Authority.

JULY 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
SEP 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK,
ATTORNEY GENERAL, ... PETITIONER,

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL, ... RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ED W. HANCOCK
Attorney General
Commonwealth of Kentucky
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

DAVID C. SHORT
Assistant Attorney General
Commonwealth of Kentucky
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

DAVID D. BEALS
Assistant Attorney General
Commonwealth of Kentucky
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

COUNSEL FOR PETITIONER

Petition for Certiorari Filed September 3, 1974
Certiorari Granted March 17, 1975

TABLE OF CONTENTS

	Page
INDEX TO CITATIONS	ii
PURPOSE AND NEED FOR THIS BRIEF	1
BACKGROUND AND OPERATION OF THE KENTUCKY IMPLEMENTATION PLAN..	2
RESPONDENTS' CONSTRUCTION OF THE SECTION 118 PHRASE, "REQUIREMENTS RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION"	8
CONCLUSION 20-22	
CERTIFICATE OF SERVICE 23-25	

INDEX TO CITATIONS

Cases — Page

Alabama v. *Seeber*, 502 F. 2d. 1238, 1243-1244, Petition For Writ of Certiorari Pending, *sub. nom.*, *Seeber* v. *Alabama*, No. 74-851 12

Train v. *Natural Resources Defense Council*, ___ U.S. ___, 43 L.Ed. 2d 731, 737-738, 739, 95 S.Ct. 1470, (April 16, 1975) 2, 15

Statutes

Clean Air Act Amendments of 1970, Title 42, Section 1857 et. seq., U.S.C. 2

Section 110, Clean Air Act Amendments of 1970, Title 42, Section 1857c-5, U.S.C. ..3, 5, 7, 10, 13, 15, 21

Section 110(e), Clean Air Act Amendments of 1970, Title 42, Section 1857c-5(e), U.S.C. 10

Section 110(e)(2), Clean Air Act Amendments of Title 42, Section 1857c-5(e)(2), U.S.C. 11

Section 111, Clean Air Act Amendments of 1970, Title 42, Section 1857c-6, U.S.C. 12

Section 111(d), Clean Air Act Amendments of 1970, Title 42, Section 1857c-6(d), U.S.C. 13

Section 112, Clean Air Act Amendments of 1970, Title 42, Section 1857c-7, U.S.C. 12, 13

Section 118, Clean Air Act Amendments of 1970, Title 42, Section 1857f., U.S.C. 2, 8, 14

Section 304, Clean Air Act Amendments of 1970, Title 42, Section 1857h-2, U.S.C. 21

Other References

Page

Environmental Protection Agency Letter of October 17, 1972 16

Executive Order 11507, 35 Federal Register 2573, February 4, 1970 19

Executive Order 11752, 38 Federal Register 34793, December 19, 1973 19

40 Federal Register 20664, (May 12, 1975) 18

Kentucky Administrative Regulation AP-1, Section 1(1) 6

Kentucky Administrative Regulation AP-1, Section 5(3)(a) 4

Kentucky Administrative Regulation AP-1, Section 5(4) 5

Kentucky Administrative Regulation AP-1, Section 5(5) 6

Kentucky Administrative Regulation AP-1, Sections 6, 7, 8, and 9 6

Kentucky Administrative Regulation AP-1, Section 11 5

Kentucky Administrative Regulation AP-10 4

S. 4358, Section 111, 91st. Congress, 2d. Session, (1970) 11

S. 4358, Section 111(a)(2)(D), 91st. Congress, 2d. Session, (1970) 12

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK,
ATTORNEY GENERAL, ... PETITIONER,

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL, ... RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

PURPOSE AND NEED FOR THIS BRIEF:

The Commonwealth feels compelled to submit this Brief in an effort to correct some of the several misconstructions and mistaken impressions conveyed and advanced by the respondents with respect to the background of this action, the nature and functioning of this Commonwealth's permit system and of its Implementation Plan as a whole, and the actions taken, or not taken, by the facilities involved. Petitioner further does not believe the re-

spondents' interpretation of the phrase "requirements respecting control and abatement of air pollution," contained in Section 118 of the Act, 42 U.S.C. §1857f., can be harmonized with other sections of the Clean Air Act, as amended, and that this construction is an effort by respondents to minimize and avoid obligations the Congress placed on all air contaminant sources

BACKGROUND AND OPERATION OF THE KENTUCKY IMPLEMENTATION PLAN:

In the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 et. seq., the Congress prescribed and set forth a clearly discernible plan for the attainment and maintenance of clean air in this country. Basic to this plan was the retention of state responsibility for the quality of the air within their respective geographical limits. However, because the state's acceptance of this responsibility under previous Acts was disappointing, the Congress provided for a means of assuring a responsive program of state implementation. These past implementation problems and the approach employed by Congress for their solution were discussed by this Court in *Train* v. *Natural Resources Defense Council*, ___ U.S. ___, 43 L. Ed. 2d 731, 95 S.Ct. 1470 (April 16, 1975):

> "Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, enacted on December 31 of that year. These Amendments sharply increased federal authority and responsibility in the

> continuing effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle that, 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .' §107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. §1857c 2(a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time." 43 L.Ed. 2d 731, at pp. 737-738, Slip Op., at pp. 2-3.

The "stick" which Congress took to the states to assure attainment of these goals took the form of specific requirements which were to be incorporated into each state's implementation plan. These measures, contained in Section 110 of the Act, 42 U.S.C. §1857c-5, were designed to give assurance that the state air pollution control programs could, at last, be counted on to achieve the goal of clean air. It then became the obligation of the states to devise and formulate a plan, incorporating the measures prescribed in Section 110 of the Act, 42 U.S.C. §1857c-5, which would lead to the implementation and attainment of the air quality standards within a specified time period. These plans, by Congressional design and mandate, were to contain not only emission standards but also a means of implementing and enforcing such standards.

The Kentucky Implementation Plan submitted to the Environmental Protection Agency, and subsequently ap-

proved by the Administrator,[1] contains as its central control mechanism the use of a permit system, a system which coordinates and integrates the functioning of all other regulations in the Kentucky Plan. Respondents' detailed recanting of the Commission's Rules of Practice, Kentucky Administrative Regulation AP-10,[2] as they relate to the Kentucky permit system is of no more value in understanding how this system is designed or how it functions to fulfill this Commonwealth's responsibilities to achieve the goals of the Clean Air Act than examination of the Administrative Procedures Act, 5 U.S.C. §500 et. seq., would be in understanding how any Federal agency discharges its responsibilities under the statute it administers.

The basic approach of the Kentucky Plan is illustrated by the provisions of Kentucky Administrative Regulation AP-1, Section 5(3)(a):[3]

[1]Kentucky's Implementation Plan was originally approved on May 31, 1972. 37 Federal Register 10842. This approval was vacated in the case of **Buckeye Power Co., et al v. EPA, 481 F.2d. 162 (6 CA, June 28, 1973).** The Kentucky Plan was resubmitted and published by the Administrator of Environmental Protection Agency as proposed rule making on March 19, 1974. 39 Federal Register 10277. On August 15, 1974, the Administrator of Environmental Protection Agency published his approval of the re-submitted Kentucky Plan with one exception not relevant to the issues herein. 39 Federal Register 29357.

[2]Respondents' Brief, p. 6.

[3]Subject Kentucky Administrative Regulations are printed in the Appendix submitted to the Court of Appeals For the Sixth Circuit at pp. 99-227.

> "In considering permit applications, the Commission shall determine if emission standards or ambient standards are met. In no case shall a permit to construct or operate be issued where it can be shown through diffusion calculations or actual ambient air quality monitoring, that the air contaminant source will prevent or interfere with the attainment or maintenance of state or federal air quality standards. . . ."

This is the primary criteria upon which this Commonwealth issues or denies a permit and is directly related to the achievement of the goals of the Act. Based on this standard a permit will be issued only if (1) agency analysis of the data submitted reveals that the source is in compliance with the applicable emission standards and does not jeopardize compliance with the ambient standards or (2) the source submits a compliance plan and timetable in accordance with Kentucky Administrative Regulation AP-1, Section 11, which agency analysis demonstrates will bring the source into compliance with these standards by the attainment dates. Thus in Kentucky it is through the functioning of the permit system that compliance schedules come into being, are reviewed by the agency, and are approved, and it is only through the permit system that these compliance schedules, and other requirements of the Kentucky Plan, may be administratively enforced.

Since the formulation and submittal of a compliance schedule is only necessary to satisfy the basic requirement for the issuance of a permit these schedules are treated as conditions to the issuance of the permit and are incorporated under Kentucky Administrative Regulation AP-1, Section 5(4). Similarly, other requirements of the Ken-

tucky Plan are made enforceable as conditions on the issuance of a permit. These include requirements relating to monitoring and the keeping of records, requirements as to sampling and testing, and requirements for dealing with emergency episodes. Kentucky Administrative Regulation AP-1, Sections 6, 7, 8, and 9. The position of the permit system as the core requirement of the Kentucky Plan and as the requirement around which all others are framed is illustrated by Kentucky Administrative Regulation AP-1, Section 1(1):

> "Regulations of the Commission shall be construed in light of the considerations set forth hereinafter which shall guide the Commission in the issuance, modification and revocation of permits."

Moreover, inclusion of these requirements as conditions on the issuance of permits is necessary since the power of the administrative agency under its current regulations is confined to the issuance, denial, revocation, or modification of permits. Further, once a permit is issued it may only be revoked or modified upon a finding that the source (a) has failed to comply with the terms and conditions of its permits, (b) has failed to comply with the applicable emission standards, (c) has failed to comply with the ambient air standards. Kentucky Administrative Regulation AP-1, Section 5(5).

The permit system is a cohesive and comprehensive mechanism which results in a single document incorporating all the requirements of the Kentucky Plan and is a system through which the Kentucky Department For Natural Resources and Environmental Protection may review each air contaminant source in Kentucky and make

a determination as to that source's compliance with the standards of the Act. It is a system which fulfills all the requirements of Section 110 of the Clean Air Act, 42 U.S.C. §1857c-5, as was determined by the Administrator of the Environmental Protection Agency, and if allowed to function would achieve the goals of the Act.

The response of the Federal facilities to this Commonwealth's request for cooperation in the implementation of the Kentucky Plan fell far short of the level needed to make the Plan work. Respondents complied only to the extent of providing the initial data necessary for the first preliminary steps in the Commonwealth's control program. After submitting registration and initial assessment data together with letters assuring future cooperation, all semblance of cooperation ceased. Although analysis of the initial data demonstrated a lack of compliance in most cases and the need for additional controls, none of the facilities submitted compliance schedules for review and approval by the administrative agency, nor have any such shedules yet been submitted for such analysis and approval. In some cases, the state agency was told what the source intended to do to bring itself into compliance but no state review of these compliance plans was ever permitted. This refusal, by respondents to submit to the state's permit program review has had the result of removing from any agency review the control activities of several of this state's largest pollution sources, and at least one major source continues to operate under a compliance schedule which the state has publicly declared is not acceptable under the Kentucky Plan. Nonetheless, this source, Tennessee Valley Authority's Shawnee Power Plant, continues to proceed on the course set by itself alone while

the Commonwealth's protests are ignored. In addition to the refusal to prepare compliance schedules in accordance with the Kentucky Plan and to submit these plans for administrative review there are several other instances where the cooperation of these respondents has been unsatisfactory. There have been no periodic reports as required in the Kentucky Plan but rather information has been supplied only upon specific request. Monitoring and sampling techniques which are unacceptable to the state have been employed, resulting in the production of unreliable data. And as a general statement, cooperation with the state has been limited to the providing of data reflecting only the current status of Federal facilities, and only when such information is specifically requested. In the absence of compliance with the state's permit system there has been no opportunity for the meaningful administrative review necessary to assure the pollution control measures employed by these facilities are adequate to assure that this Commonwealth's attainment of the ambient air quality standards will not be jeopardized. This is not proper cooperation with the state nor is this conduct in accord with the proper implementation or enforcement of the requirements of the Clean Air Act, as amended.

RESPONDENTS' CONSTRUCTION OF THE SECTION 118 PHRASE, "REQUIREMENTS RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION":

The basic contention of the respondents is that the phrase "requirements respecting control and abatement of air pollution" in Section 118, 42 U.S.C. §1857f., refers to,

and directs compliance with, only "the applicable emission standards and compliance schedules promulgated by the particular state pursuant to their EPA-approved plan to establish and maintain national air quality standards." (Respondents' Brief, p. 19). However, this overlooks and ignores the fact that the formulation of compliance plans and timetables pursuant to the Kentucky Plan involves and necessitates the proper operation of the permit system, the mechanism through which the state may review the control strategies proposed by each air contaminant source and make the necessary determination that in each case these plans will indeed bring the source into compliance with the applicable standards by the attainment date and will not jeopardize the attainment of the ambient standards. None of the respondents herein have submitted their control strategies for this review and none is committed to a compliance schedule approved under, or pursuant to, the Kentucky Plan. Thus, while paying lip service to the "EPA-approved plan," respondents nonetheless ignore this plan, proceeding as if each source may develop its own compliance schedule free from administrative review or approval and may satisfy the requirements of the Clean Air Act by adhering to this self-generated and unreviewed schedule. Despite adherence to these announced "compliance schedules," this approach leads, as it has in Kentucky, to the situation where, due to the lack of prior state approval, the so-called "compliance schedule" is such that compliance may not be achieved and attainment of the ambient standards will be jeopardized.

In addition to this internal inconsistency with regard to the manner of the creation of compliance schedules and the admitted need to comply with such schedules, the

respondents' contention as to their compliance obligation excludes requirements relating to monitoring, records, reporting, sampling and testing methods, and procedures for air pollution emergencies, which, presumably, are "procedural" requirements of the Kentucky Plan with which respondents need not comply. This narrow view of the term "requirements" does not, however, coincide with the requirements the Congress felt would be necessary to provide for the attainment and maintenance of the national air quality standards and which were expressed in Section 110 of the Act, 42 U.S.C. §1857c-5. In this section, the Congress specified those requirements which were to be imposed through the operation of the state implementation plans. Clearly, no plan could be approved by the Administrator unless such requirements were incorporated; just as clearly, there exists no basis for making a differentiation within which some of these requirements may be designated "requirements respecting control and abatement of air pollution" and some may not. However, it is just such a differentiation which respondents seek to construct from other sections of the Act.

Respondents' reliance upon Section 110(e), 42 U.S.C. §1857c-5(e), is, however, not helpful in such a construction. This section provides that the *states* can request and obtain an extension of the attainment dates for the primary standard and is limited to "requirements . . . which implement such primary standard." This extension of attainment dates does not effect what requirements need be applied, nor does it exempt any source from any requirements, but rather provides only that the states may approve compliance schedules which delay compliance an additional two (2) years. Further, such extensions are

limited to situations where the state plan does provide for implementation of the standards for all sources for which compliance is possible and further that the plan provides interim measures of control as are deemed reasonable for those sources for which compliance is not technologically possible.[4] Moreover, respondents' conclusion that the operation of the state's permit system requires no technological sophistication[5] is simply out of touch with the realities of air pollution control and the manner of implementating technological advances. It is through the use of this system that compliance schedules may be modified or formulated to reflect these advances.

Equally unenlightening as to the meaning of "requirements" is respondents' discussion of Section 111 of the Senate Bill.[6] This section is substantially the same as Section 110 of the Act and imposes the same obligations upon the state. Under Section 111 of the Senate Bill, a state implementation plan could only be approved by the "Secretary" if he determined the plan contained a number of specified requirements, including both emission requirements and "appropriate procedures, including but not limited to, . . . permits, for insuring that any source of air pollution agents . . . will be located, operated, . . . designed, constructed, and equipped in such a way that such sources will not interfere with implementation, maintenance, and enforcement of any applicable air quality

---

[4] §110(e)(2), 42 U.S.C. §1857c-5(e)(2).

[5] Respondents' Brief, p. 21.

[6] S. 4358, 91st Congress, 2d. Session (1970).

standard and goal." Section 111(a)(2)(D), S. 4358, 91st Cong., 2d. Sess. (1970). In addition to being an excellent description of the functions performed by the permit system of the Kentucky Plan, this section also demonstrates that the Senate felt achievement of the goals of the Act would require more than the imposition of emission standards. This section serves only to demonstrate further that the Congress did not regard emission standards as the exclusive requirements relating to the control and abatement of air pollution.

Respondents' reliance on Section 111 and Section 112 of the Act, 42 U.S.C. §1857c-6 and §1857c-7, are also misplaced. These sections deal with new sources and hazardous pollutants, areas in which the Administrator has exclusive control of the standards and also where enforcement authority is exclusively reserved to the Administrator with respect to federal sources. The differentiation between new and existing sources and the problems associated with the control of each was discussed by the Court of Appeals For the Fifth Circuit in *Alabama* v. *Seeber*, 502 F. 2d 1238, Petition For Writ of Certiorari pending, *sub nom. Seeber* v. *Alabama*, No. 74-851, (also reprinted in Petitioner's Supplemental Memorandum to Petition For Writ of Certiorari as Appendix "D"):

> "With respect to existing stationary sources of air pollution the Act places the primary responsibility for setting and enforcing emission standards or limitations on the states. EPA, pursuant to §109 of the Act [42 U.S.C. §1857c-4] establishes primary and secondary ambient air quality standards, and the

states, pursuant to §110 [42 U.S.C. §1857c-5] establish, subject to approval by EPA, implementation plans geared to meeting the air quality standards . . .

Sections 111, 112, and 114 [42 U.S.C. §§1857c-6, 1857c-7, and 1857c-9] of the Act explicitly exempt certain federal facilities from state authority to enforce requirements established by EPA pursuant to those sections. Those sections deal with specialized emission standards for new sources and hazardous pollutants and with recordkeeping, inspection and monitoring requirements established directly by EPA. In view of these explicit exemptions for federal facilities, particularly the exemptions in §§111 and 112, which like §110 establish control schemes for certain classes of air pollution sources, the absence of any such exemption in §110 suggests that the provisions of implementation plans adopted and approved pursuant to that section, including provisions for state enforcement of emission limitations through permit systems, are applicable to federal facilities.

The general scheme that emerges from the Act as a whole appears to be that responsibility and authority for enforcement with respect to federal facilities is granted to the states for sources with respect to which state implementation plans establish the criteria for enforcement, and is granted to EPA in those instances (i.e., new sources and hazardous pollutants) where EPA establishes the criteria. The scheme is a reasonable one. Because of variations in air quality between states and regions the emissions criteria established under state plans may vary con-

siderably, thus making enforcement by EPA against scattered federal facilities administratively difficult. The new source and hazardous pollutant criteria established by EPA, however, are not tied to air quality standards and may, therefore, vary little or not at all by area, making EPA enforcement against federal facilities more convenient." *Alabama* v. *Seeber, supra,* at pp. 1243-44, (Appendix "D", pp. 9d-13d).

The most important inference which can be drawn from these sections is, then, that where the Congress wished to exclude Federal facilities from outside control, they did so expressly and in specific language such as that contained in Sections 111 and 112 but which is notably absent from Sections 110 or 118.

Further, Section 111 does speak specifically of state control over existing sources. Section 111(d) provides that if the Administrator has set a standard of performance for a new source which calls for an air quality criteria for a pollutant which is not included in the state plan, the state is required to impose a standard for the pollutant with regard to existing sources. This further demonstrates that control of air pollution from existing suorces was to be accomplished through the operation of state implementation plans. Respondents, however, suggest that such control is to be accomplished through the use of court action pursuant to Section 304 of the Clean Air Act, as amended, 42 U.S.C. 1857h-2.

Respondents' interpretation of Section 304 of the Act renders the provisions of Section 118, 42 U.S.C. §1857f., superfluous, having no operative effect whatsoever. No reference to Section 118 is necessary to determine that Section 304 subjects Federal facilities to action for violation of emission standards and compliance schedules; Section 304 quite clearly and expressly states such liability. In addition to the fact that Congress foresaw an entirely different function for "citizen suits" than do the respondents herein, the interpretation advanced by the respondents places the implementation of the Clean Air Act squarely and exclusively on the courts with no resort to any administrative processes. Instead of utilizing the administrative framework prescribed by the Congress in Section 110, 42 U.S.C. §1857c-5, and made applicable through Section 118, respondents contend that each Federal source is to see to its own compliance or be subject to court action. The construction advanced does not, therefore, take any cognizance of any necessity for administrative planning or review and does not accord Section 118 any meaning save as a restatement of the requirements imposed in Section 304. However, such planning and review was, and is, quite clearly necessary. As this Court stated in *Train* v. *Natural Resources Defense Council,* ____ U.S. ____, 43 L.Ed. 2d 731, 95 S.Ct. 1470 (Apri 16, 1975):

> "No one can doubt that Congress imposed upon the Agency and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time." 43 L.Ed. 2d 731, at p. 739, Slip Op. at p. 6.

The authority of the states to carry out their plans with respect to Federal sources is, we submit, contained in Section 118. There can be no explanation for the existence of Section 118 if it imposes no obligations other than those

imposed under Section 304, and there is no reasonable explanation for the inclusion of additional requirements prescribed in Section 110 if such requirements are not "requirements respecting control and abatement of air pollution."

Respondents cite numerous authorities in support of the proposition that the administrative interpretation of the Clean Air Act is entitled to deference by this Court. The position of the respondent Environmental Protection Agency would be entitled to greater weight in this action if the advice given had been followed or if the agency had taken any timely action to assure its advice was carried into action. However, the recommendations of the Environmental Protection Agency were not followed by the operating respondents and the Environmental Protection Agency took no action to see the instructions were carried out until May of 1975.

In the October 17, 1972, letter sent to the respondents herein, the Environmental Protection Agency made the following recommendation:

> "We recommend that each Federal facility under your jurisdiction which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compliance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records." (Appendix, pp. 57-58).

Despite this advice, respondents did not develop compliance schedules as required by Kentucky's Implementation Plan. No such schedules were submitted for the approval of the state agency and few of these self-generated and unreviewed plans were discussed with the state. The Kentucky Implementation Plan provides for the participation of the state's air pollution control agency in the formulation of these compliance schedules through the operation of the permit system and it is through the operation of this system that each of the determinations necessary to prescribe the requisite controls, listed in the Environmental Protection Agency's recommendations, are made.

The recommendation was made in October of 1972, and yet it was not until May of 1975, scant months in advance of the attainment date for most pollutants,[7] that the Environmental Protection Agency felt it necessary to check on the compliance status of Federal installations or to prescribe guidelines for the formulation of control

---

[7]The attainment date for the Commonwealth of Kentucky was July 1, 1975, except with respect to emissions of sulfur-dioxide. Pursuant to the request of the Governor of Kentucky the Commonwealth's attainment date for sulfur-dioxide concentrations has been extended to July 1, 1977.

strategies for sources not currently in compliance.[8] As respects the timely attainment of the national standards of air quality, the planning, in May of 1975, of the control measures necessary to bring Federal air contaminant sources into compliance is simply too late. Had the agency taken action at the time of the breakdown of the administrative process they themselves approved, such determinations would have been made in 1972 or 1973, as they should have been under the Kentucky Implementation Plan.

Moreover, the conclusion stated in the letter sent by the Environmental Protection Agency with respect to Federal compliance with state requirements either does not apply to a permit system such as that employed in Kentucky or ignores the nature and operation of such a system. The letter concludes:

> "[w]e do not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit application that will lead automatically to issuance of a state permit or license." (Appendix, p. 58).

[8]Respondent Russell E. Train, Administrator of the Environmental Protection Agency, issued an order entitled "Compliance with Stationary Source Air Pollution Standards; Federal Agencies Guidelines" on May 6, 1975. This Order was published in the Federal Register on May 12, 1975, and stated as its purpose:

> "The purpose of this guideline is to provide a means to determine the compliance status of all Federal stationary sources of air pollutants which are subject to Federal, State, and local emission limitations and establish firm public commitments to abate emissions as expeditiously as practical from the facilities exceeding limitations." 40 Fed. Reg. 20664, May 12, 1975.

As can be readily seen from the above, the Environmental Protection Agency's position that state operating permits are not required for Federal facilities was limited by the condition "*if* the registration process is in effect a permit application that will lead automatically to issuance of a state permit of license." (Emphasis Added). The submission of a permit application to the Kentucky Department For Natural Resources and Environmental Protection does not, under any reasonable construction of the Kentucky Implementation Plan, lead automatically to, or guarantee, the issuance of a permit. In fact, no permit may be issued until after the formulation, review and ultimately the approval of the applicant's compliance schedule and the formulation and imposition of such monitoring and reporting conditions as are necessary to assure the control strategy is implemented in a timely manner and is functioning up to expectations. Such determinations are certainly not automatic but rather require extensive administrative analysis and planning.

As a further administrative interpretation of the responsibilities of Federal air contaminant sources under the Clean Air Act, the respondents cite Executive Order 11752. This Order superceded Executive Order 11507[9] and was

[9]Executive Order 11507, 35 Fed. Reg. 2573 (February 4, 1970) entitled "Prevention, Control and Abatement of Air and Water Pollution at Federal Facilities."

issued by President Nixon on December 19, 1973, after the initiation of this and similar actions in California and Alabama. Executive Order 11752 differed from Executive Order 11507 in few respects. The primary change is reflected in the position that Federal facilities should not comply with state or local administrative procedures. In contrast, Executive Order 11507 directed that Federal facilities were to conform to air quality standards as defined in Section 2(d) of that Order, which read in part:

> "The term air and water quality standards shall respectively mean the air quality standards *and related plans of implementation* including emission standards, adopted pursuant to the Clean Air as amended . . ." (Emphasis Added).

The reversal of this position after the initiation of legal actions against agencies under Executive control, including respondents herein, demonstrates the self-serving nature of Executive Order 11752 and as such this interpretation should be accorded no weight by this Court.

CONCLUSION

The regulatory scheme which emerges from an examination of the Clean Air Act as a whole does not, and has not been shown to, support respondents' contention that "requirements respecting control and abatement of air pollution," made applicable by Section 118, 42 U.S.C. §1857f., are limited to emission standards and self-generated compliance schedules. The control of air pollution from existing stationary sources was, and is, to be accomplished through the operation of state implementation plans containing all the requisite controls specified in Section 110 of the Act, 42 U.S.C. §1857c-5. The Congress directed that the Administrator could not approve any implementation plan unless each of the eight requisites specified in Section 110(a)(2) was incorporated in such plan. There exists no rational basis for differentiating the one provision requiring the incorporation of emission standards and compliance schedules from the other seven elements required to be incorporated. Each was considered necessary to assure achievement of the goals of the Act and each is a "requirement respecting control and abatement of air pollution." By limiting these Section 118 requirements so that they would be identical to the requirements which respondents are subject to by virtue of Section 304, 42 U.S.C. §1857h-2, the respondents have rendered Section 118 utterly without operative effect and they successfully avoid, as governmental agencies, the obligations imposed by Congress on all citizens in the Clean Air Act.

For these and the foregoing reasons, the Judgments of the United States District Court For the Western District of Kentucky and the United States Court of Appeals For the Sixth Circuit should be reversed and an Order entered granting Petitioner's Motion For Summary Judgment and requiring respondents herein to comply with the provisions of Kentucky's Implementation Plan For the

Attainment and Maintenance of National and State Ambient Air Quality Standards, as required by the Clean Air Act, as amended.

Respectfully Submitted,

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

COUNSEL FOR PETITIONER.

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein *REPLY BRIEF* for petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, was served by mailing three copies hereof, via United States mail, air mail postage prepaid, to: Honorable Robert H. Bork, Solicitor General, Honorable A. Raymond Randolph, Jr., Deputy Solicitor General, and Honorable Harry R. Sachse, Assistant Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530; Honorable Edward Levi, Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Jacques B. Gelin, Attorney, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Robert H. Marquis, General Counsel, Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Honorable Beauchamp E. Brogan, Associate General Counsel, and Honorable Justin M. Schwamm, Assistant General Counsel, Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee, 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee, 37830; Honorable Evelle J. Younger, Attorney General, Honorable Robert H. O'Brien, Assistant Attorney General, Honorable Carl Boronkay, Assistant Attorney General, Honorable Nicholas C. Yost,

Deputy Attorney General, Honorable Roderick Walston, Deputy Attorney General, Honorable Daniel Taaffe, Deputy Attorney General, and Honorable C. Foster Knight, Deputy Attorney General, State of California, 110 West "A" Street, Suite 600, San Diego, California, 92101; Honorable Arthur K. Bolton, Attorney General, and Honorable Robert E. Hall, Assistant Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia, 30334; Honorable Louis J. Lefkowitz, Attorney General, Honorable Samuel A. Hirshowitz, First Assistant Attorney General, Honorable Philip Weinberg, Assistant Attorney General, and Honorable Richard G. Berger, Assistant Attorney General, State of New York, Two World Trade Center, New York, New York, 10047; Honorable John J. Hill, Attorney General, Honorable David M. Kendall, First Assistant Attorney General, and Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Supreme Court Building, Austin, Texas, 78711; Honorable Andrew P. Miller, Attorney General, and Honorable J. Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219; and by mailing three copies hereof, via United States mail, postage prepaid, to: Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky, 40202; and by mailing copies hereof, via United States mail, postage prepaid, to: Honorable James F. Gordon, Judge, United States District Court, Western District of Kentucky, United States Courthouse, Louisville, Kentucky, 40202; and Honorable Lester L. Cecil, Senior Circuit Judge, Honorable Pierce Lively, Circuit

Judge, and Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio, 45202, and further the undersigned hereby certifies that all parties required to be served in this action have been served, all this the 10 day of September, 1975.

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

David C. Short

By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

David D. Beals

By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-220

* * *

COMMONWEALTH OF KENTUCKY, EX REL.
ED W. HANCOCK, ATTORNEY GENERAL,

Petitioner

V.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents

* * *

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

* * *

BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

PHILIP K. MAXWELL
Assistant Attorney General

Supreme Court Building
Austin, Texas 78711
(512) 475-4143

ATTORNEYS FOR AMICUS CURIAE
STATE OF TEXAS

June, 1975

SUBJECT INDEX

Page

INTEREST OF AMICUS CURIAE, STATE OF TEXAS 1

ARGUMENT AND AUTHORITIES 4-11

I. A STATE PERMIT PROGRAM IS CLEARLY A "REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION" WITH WHICH THE FEDERAL GOVERNMENT MUST COMPLY UNDER 42 U.S.C. SECTION 1857f 4

II. NEITHER THE SUPREMACY CLAUSE NOR THE DOCTRINE OF SOVEREIGN IMMUNITY ARE APPLICABLE TO THIS CASE 8

III. CONCLUSION 12

APPENDICES

APPENDIX A: TEXAS AIR CONTROL BOARD REGULATION VI. .1a-4a

APPENDIX B: SELECTED COMMENTS OF HOUSE MEMBERS ON THE DUTY OF THE FEDERAL GOVERNMENT UNDER THE FEDERAL CLEAN AIR ACT 1b-2b

INDEX OF AUTHORITIES

CASES — Page

Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974) 4, 6, 8

Caminetti v. United States, 242 U.S. 470 (1917) 5

Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), cert. den., 397 U.S. 941 (1970) 11

Dugan v. Rank, 372 U.S. 609 (1963) 11

Kentucky v. Ruckelshaus, 362 F. Supp. 360, (W.D. Ky. 1973) 10

Kentucky v. Ruckelshaus, 497 F. 2d 1172 (6th Cir. 1974) 4

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 8

Mayo v. United States, 319 U.S. 441 (1943) 8

Perez v. Campbell, 402 U.S. 637 (1971) 9

Texas v. EPA, 499 F.2d 289 (5th Cir. 1974). 4

Texas v. United States Department of Defense, C.A. SA-74-CA-271, (W.D. Tex., filed Oct. 31, 1974) 4

STATUTES, REGULATIONS, ORDERS — Page

Federal Clean Air Act: 42 U.S.C. Sec. 1857 et seq. (1970) as amended, 42 U.S.C. Sec. 1857 et seq. (Supp. III, 1973) 2

42 U.S.C. Sec. 1857 (a) (3). 3
42 U.S.C. Sec. 1857c-5 (a). 8
42 U.S.C. Sec. 1857c-6 (c) (1) 6, 10
42 U.S.C. Sec. 1857c-9 (b) (1) 6
42 U.S.C. Sec. 1857f 5, 9

Texas Air Control Board Regulation VI (1972) 2, 1a-4a

MISCELLANEOUS

Webster's Third International Dictionary (1969). 5

116 CONG. REC. (1970). 6, 7

1970 U.S. Code Cong. & Admin. News 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

Commonwealth of Kentucky, ex rel.
Ed. W. Hancock, Attorney General,
Petitioner

vs.

Russell E. Train, Administrator,
Environmental Protection Agency, et al.,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF THE STATE OF TEXAS, AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE, STATE OF TEXAS

As part of its plan to implement the national ambient air standards under the federal Clean Air Act,[1] the State of Texas requires that any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants to obtain a construction permit from the Texas Air Control Board, and to obtain an operating permit from the Board within sixty (60) days after operation of the facility begins.[2]

The granting of a construction permit is conditioned, inter alia, on a determination that "/t/ he proposed facility will not prevent the maintenance or attainment of any ambient air standard," and that "/t/ he proposed facility will utilize the best available /air pollution/control technology. . . ."[3] An operating permit is issued only if "/t/ he facility has been constructed in accordance with the requirements and conditions contained in the permit to construct."[4]

---

[1] 42 U.S.C. Sec. 1857 et seq., (1970), as amended, 42 U.S.C. Sec. 1857 et seq. (Supp. III, 1973).

[2] Texas Air Control Board Regulation VI, attached hereto as Appendix A. The permit requirements are specifically set forth in Sections 3.27(a) and 3.28(a) of the Texas Clean Air Act, TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1975).

[3] Regulation VI.

[4] Regulation VI.

The permit program, while not the sole method of attaining the federal air quality standards in Texas, is certainly one of the most important. Subjecting air pollution sources to preconstruction and premodification review provides the State with the opportunity to stop air pollution problems before they start. By requiring at the outset that steps be taken to ensure that the source does not endanger the ambient air standards, the permit program reduces the chances of a later enforcement action to require either that the source shut down altogether, or, at a minimum, that it retool its operation to install more effective abatement equipment at what will likely be increased costs. More importantly, the permit program greatly serves the goal of clean air, since it acts to prevent violation of air quality standards from ever occurring.

The prevention of air pollution at its source is an explicit goal of the federal Clean Air Act. 42 U.S.C. Section 1857 (a)(3) The "primary responsibility" for achieving this goal is placed by the Act squarely on the States and on local governments. Id. The requirement that a permit be secured prior to construction and operation of an air pollution source, as has been shown, is essential to the fulfillment of this responsibility. Accordingly, Texas has brought suit against the Department of Defense, et al., to require, inter alia, that it obtain Texas Air Control Board permits for four aviation fuel storage tanks at Kelly Air Force

Base in San Antonio.[5] Texas, therefore, has a direct interest in the outcome of the instant case.

ARGUMENT AND AUTHORITIES

I. A State permit program is clearly a "requirement respecting control and abatement of air pollution" with which the Federal Government must comply under 42 U.S.C. Sec. 1857f.

Texas believes that the issue sub judice was correctly decided in Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974), and urges the Court to adopt the result reached in that case. While there is little room to improve either on the Fifth Circuit's well-reasoned analysis of the federal Clean Air Act or on its critique of the Sixth Circuit's decision in the instant case,[6] Texas offers the following brief argument.

---

[5] Texas v. United States Department of Defense, C.A. SA-74-CA-271, W.D. Tex., filed Oct. 31, 1974. Control of hydrocarbon emissions from stationary sources is crucial to Texas' plan for attaining and maintaining the national ambient air standard for photochemical oxidants. See Texas v. EPA, 499 F.2d 289 (5th Cir. 1974) (suit challenging EPA's (a) rejection of Texas plan for achieving the oxidant standard and (b) promulgation of its own plan to meet this standard).

[6] Kentucky v. Ruckelshaus, 497 F.2d 1172 (6th Cir. 1974).

To discover whether Congress intended that federal instrumentalities should comply with state permit requirements the plain and unambiguous language of the Clean Air Act first must be considered. Caminetti v. United States, 242 U.S. 470 (1917). Section 1857f of the Clean Air Act plainly directs federal facilities to "comply with Federal, state . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." The permit program of the State of Kentucky quite clearly comes within this statutory language.

The Kentucky permit program, like that of Texas, is obviously a "requirement," in the ordinary sense of that word. Webster's Third International Dictionary (1969) at page 1929 defines "requirement" as something "needed," "called for," or "demanded"; a "requisite or essential condition." As amply demonstrated in the brief submitted by Kentucky, that State's permit program is not only "demanded" in the legal sense by state regulation, it is "essential" to Kentucky's effort to achieve the federally set ambient air quality standards. Respondents would have this Court depart from the ordinary meaning of "requirement" and define it to include only "applicable standards of air quality and emissions," the phrase employed in the Conference Report on the Clean Air Act, 1970 U.S. Code Cong. & Admin. News at 5381. Such a departure is clearly unwarranted.

Had Congress intended that the Federal Government comply only with state emission standards it would have said so. In fact, the Conference Com-

mittee rejected similar language -- "shall comply with applicable Federal, State, interstate, and local emission standards" -- found in the original House version of the Act in favor of the Senate version employing the word "requirements." 116 Cong. Rec. 19228 (1970). Similarly, had Congress intended to exempt federal facilities from all state requirements except "applicable standards of air quality and emissions," it could easily have done so by use of specific exclusionary language like that employed elsewhere in the Act. For example, 42 U.S.C. Sec. 1857c-6(c)(1) allows the EPA Administrator to delegate to the states power to enforce performance standards for new stationary sources "except with respect to new sources owned and operated by the United States." Identical language limiting the power of the states is also found in 42 U.S.C. Sec. 1857c-9(b)(1) which permits a delegation of authority to the states to enforce certain recordkeeping and monitoring requirements. These two facts -- rejection of the more restrictive House language in favor of the more comprehensive phrase "requirements respecting control and abatement of air pollution" and the failure to use specific exclusionary language, employed elsewhere in the Act, to exempt federal facilities from state permit requirements -- evinces an unequivocal Congressional intent to subject federal facilities to the same regulatory measures applicable to every other source of air pollution.

Moreover, the legislative history of the Act, as noted by the Fifth Circuit in Seeber,[7] showed a clear

[7] Alabama v. Seeber, 502 F.2d 1238, 1245 (5th Cir. 1974).

Congressional displeasure with the air pollution abatement efforts of the federal facilities. As Senator Spong remarked:

> . . . Federal agencies have been notoriously laggard in abating pollution. The pending bill would require Federal agencies to provide leadership for the control of air pollution. Only the President could exempt a Federal facility from the act, and then only if he determined the exemption to be in the paramount interest of the United States . . . .
>
> We cannot expect individuals and businesses to be motivated to abate pollution if their Government continues to pollute. I support wholeheartedly the mandate for the Federal Establishment to live up to the national commitment for clean air. 116 Cong. Rec. 32930 (1970).[8]

Congress, in short, meant what it said -- the federal Government shall be subject to the same air pollution control requirements as every one else, except where the President concludes that it is in the paramount national interest to exempt a federal facility from some specific requirement. The result reached by the Sixth Circuit, granting federal facilities a blanket exemption from state

[8] For similar comments by members of the House, see Appendix "B".

permit requirements, does violence to this carefully conceived regulatory scheme. For this reason the judgment of that court must be reversed.

II. Neither the Supremacy Clause nor the Doctrine of Sovereign Immunity are applicable to this case.

In rejecting these defenses in Seeber,[9] the Fifth Circuit reasoned that since Congress may subject the federal government both to state regulation[10] and to suit,[11] and since Congress had accomplished both these results in the federal Clean Air Act, neither the Supremacy Clause nor sovereign immunity were available to bar a suit to compel compliance with such regulation. The logic is unassailable. Texas, however, respectfully offers these additional observations.

First, Kentucky's permit requirements, like those of Texas, were not issued in the provincial exercise of state police power, but in direct response to the Clean Air Act's mandate to the states to implement the national ambient air standards set by the federal Environmental Protection Agency. 42 U.S.C. Section 1857c-5(a). Thus, if the operations of federal facilities are fettered somewhat by the Kentucky permit program requirements, it is not due to "state regulation" in its traditional sense, but due rather to the will of Congress, expressed in the Clean Air Act, that the states assume the primary role of controlling air pollution at its source.

[9] Alabama v. Seeber, 502 F.2d 1238, 1247-48 (5th Cir. 1974).

[10] Mayo v. United States, 319 U.S. 441, 446 (1942).

[11] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

The Supremacy Clause is inapposite for the further reason that Kentucky's permit requirement has not been shown to in any way frustrate federal law, the evil against which the Supremacy Clause was designed to protect. See, Perez v. Campbell, 402 U.S. 637 (1971). To the contrary, the Kentucky permit program is in furtherance of -- indeed essential to -- the operation of at least one federal law, to-wit, the federal Clean Air Act.

Congress, however, was not unmindful that state requirements might unduly interfere with the activities of a federal instrumentality. Its solution to this potential problem was not to provide an across the board exemption of federal facilities from such requirements, but to authorize the President, on a case-by-case basis, to exempt them "if he determines it to be in the paramount interest of the United States to do so." 42 U.S.C. Sec. 1857f. The authority of the President to exempt federal facilities achieves the same policy objectives sought by the Supremacy Clause. If obtaining state permits frustrates the federal law under which the federal facility operates, and the paramount national interest is disserved thereby, the President can exempt the facility. Though not mentioned by the Sixth Circuit, the district court in the instant case feared

that Kentucky's permit program could interfere with "important Federal actions," and that the President's exemption power was too circumscribed to forestall such interference.[12] In concluding that the President could only exempt where he had requested an appropriation for federal air pollution control equipment and Congress had failed to comply with the request,[13] the district court was clearly wrong. Section 1857f is quite plain in its statement that the President may exempt a federal facility on the grounds that there is no money with which to comply only if he has requested the money and Congress has failed to give it to him. This narrow limitation in no way restricts the President's authority to exempt for other reasons, such as national defense or other paramount national concerns. The district court also noted that the President may not exempt federal facilities from new stationary source standards. While this is true, it is of little relevance here, since 42 U.S.C. Section 1857c-6(c)(1) prevents the states from enforcing new stationary source standards against federal facilities.

The doctrine of sovereign immunity is likewise inapplicable to the instant case. Kentucky seeks to compel federal officers to comply with their duty under the federal Clean Air Act to obtain permits to operate sources of air pollution. Such an action is within the well-recognized exception to sovereign

---

[12] Kentucky v. Ruckelshaus, 362 F.Supp. 360, 367 (W.D. Ky. 1973).

[13] Id.

immunity permitting suits against federal officers for acts (of omission or commission) beyond their statutory powers. Dugan v. Rank, 372 U.S. 609, 621, 622 (1963). To avoid the obvious problem of "deciding the case on the merits under the guise of resolving the preliminary jurisdictional issues," the Court should accept "at face value, for jurisdictional purposes, the averments of the complaint unless they are so transparently insubstantial or frivolous as to afford no possible basis for jurisdiction, and . . . /give/ the averments thus accepted their natural jurisdictional consequences." Carter v. Seamans, 411 F.2d 767, 770 (5th Cir. 1969), cert.den. 397 U.S. 941 (1970). Applying that technique to the case before it, the court in Carter found that for jurisdictional purposes only, "the case sub judice is not against the United States, but one rather to compel the Secretary of the Air Force to perform a clear legal duty." Carter v. Seamans, supra, 411 F.2d at 771. Accordingly, the court held the defense of sovereign immunity was unavailable.

The situation is no different here than it was in Carter. Kentucky has alleged that the federal Clean Air Act imposes a duty on TVA and the Army to apply for state permits and has prayed the court to compel the performance of this duty. Whether the Act, in fact, does require federal compliance with Kentucky's permit program is a question to be decided on the merits and should not be confused with the sovereign immunity issue.

CONCLUSION

The State of Texas urges this Court to reverse the judgment of the Sixth Circuit and to hold that TVA and the Army must comply with Kentucky's air pollution control permit requirements. At stake is not a mere state procedural requirement which can easily be supplanted by another or dropped altogether. Rather it is the only practicable method of preventing air pollution, which is the main thrust and goal of the Clean Air Act. Enforcement actions brought after an emission limitation or a compliance schedule deadline is violated is no substitute for engineering review prior to the construction or modification of an air pollution source. Where the former mechanism seeks to abate or redress an existing or threatened condition of air pollution, the latter seeks to prevent that condition or threat from ever arising. If the decision of the Sixth Circuit stands, and federal facilities are insulated from state permit requirements, the Federal Government, contrary to the wishes of Congress, will be effectively exempted from the national commitment to end air pollution.

The judgment of the Sixth Circuit must be reversed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

PHILIP K. MAXWELL
Assistant Attorney General

Attorneys for Amicus Curiae,
State of Texas

Supreme Court Building
Austin, Texas 78711
(512) 475-4143

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of the State of Texas, Amicus Curiae in Support of Petitioner was served by mailing true copies hereof via United States mail, postage prepaid, to: Honorable William B. Saxbe, The Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Walter Kiechel, Jr., Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Martin Green, Section Chief, Pollution Control Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable James A. Glasgow, Attorney, Land and Natural Resources Division, Department of Justice, Tenth and

Constitution Avenue, Washington, D. C. 20530; Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Jacques B. Gelin, Attorney, Appellate Section, Department of Justice, Washington, D. C. 20530; Honorable Kent Frizzell, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Robert H. Marquis, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Beauchamp E. Brogan, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Justin M. Schwamm, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Evelle Younger, Attorney General, State of California, Honorable Foster Knight, Deputy Attorney General, State of California, Honorable Robert H. O'Brien, Assistant Attorney General, State of California, Honorable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 West First Street,

Los Angeles, California 90012; Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Honorable David C. Short, Assistant Attorney General, Division of Natural Resources and Environmental Law, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Honorable David D. Beals, Assistant Attorney General, Division of Natural Resources and Environmental Law, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Honorable Robert F. Trevey, Attorney, Department for Natural Resources and Environmental Protection, Division of Air Pollution, East Main Street, Frankfort, Kentucky 40601; Honorable James F. Gordon, United States District Judge, Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, Honorable Pierce Lively, Circuit Judge, United States Court of Appeals For the Sixth Circuit, and Honorable Lester L. Cecil, Senior Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio 45202, all this the 7th day of June, 1975.

Philip K. Maxwell

PHILIP K. MAXWELL
Assistant Attorney General

APPENDIX A

REGULATION VI

CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

Rule 601. Section 3.27 (a) and Section 3.28(a) of the Texas Clean Air Act require any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this State to obtain a construction permit from the Texas Air Control Board before any actual work is begun on the facility, and to obtain an operating permit from the Texas Air Control Board in order to continue to operate the facility after a sixty day start-up period.

Rule 602. The owner of the facility or the operator of the facility authorized to act for the owner is responsible for applying for and obtaining a permit to construct and operate.

Rule 603. Consideration for Granting a Permit to Construct and Operate.

603.1 In order to be granted a permit to construct, the owner or operator of the proposed facility shall submit information to the Texas Air Control Board

in order that the Texas Air Control Board may determine that:

603.11 The proposed facility will comply with all Rules and Regulations of the Texas Air Control Board and with the intent of the Texas Clean Air Act.

603.12 The proposed facility will not prevent the maintenance or attainment of any ambient air quality standard.

603.13 The proposed facility will not cause significant deterioration of existing ambient air quality in the area.

603.14 The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the Executive Secretary.

603.15 The proposed facility will be located in accordance with proper land use planning.

603.16 The proposed facility will utilize the best available control technology, with consideration to the technical practicability and economic

reasonableness of reducing or eliminating the emissions resulting from the facility.

603.17 The proposed facility will achieve the performance specified in the application for a permit to construct.

603.2 If the owner of the proposed facility cannot demonstrate that the facility will comply with Rule 603.17, a conditional construction permit may be granted until such time as the owner can demonstrate compliance with Rule 603.17.

603.3 In order to be granted a permit to operate the owner of the facility shall demonstrate that:

603.31 The facility is complying with the Rules and Regulations of the Texas Air Control Board and the intent of the Texas Clean Air Act.

603.32 The facility has been constructed in accordance with the requirements and conditions contained in the permit to construct.

Rule 604. Pursuant to Section 3.27(a) of the Texas Clean Air Act, a permit to construct and a permit

to operate shall not be required for those sources exempt by the Texas Air Control Board. A list of exemptions is available upon request from the Executive Secretary of the Board.

Rule 605. Persons desiring to be exempt from the permit system may apply in writing to the Executive Secretary of the Texas Air Control Board.

Rule 606. Installations exempt by the Texas Air Control Board may be required by local air pollution control agencies to receive a permit or permits from that agency, or register with that agency.

Rule 607. The rules contained in this Regulation shall be in force immediately and shall supersede the previous Regulation VI which became effective on March 5, 1972.

Date Adopted: July 27, 1972

Date Filed with Secretary of State: August 1, 1972

Date Effective: August 31, 1972

APPENDIX B

SELECTED COMMENTS OF HOUSE MEMBERS ON THE DUTY OF THE FEDERAL GOVERNMENT UNDER THE FEDERAL CLEAN AIR ACT

Representative Staggers: "Instead of exercising leadership in controlling or eliminating air pollution the Federal Government has tended to be slow in this respect. The foregoing provision is designed to reverse this tendency." 116 Cong. Rec. 19205 (1970).

Representative Springer: "One of the frustrating aspects of air pollution legislation is the presence of large Federal installations either operated directly by the Government or under its direction which contaminate the atmosphere on a large scale. How can we expect cooperation or creditability for the governmental effort when the installations controlled by Uncle Sam are some of the worst polluters? The Federal Government as much as some private businesses has dragged its feet for purely economic reasons. Allowing the Government to remain immune from the rules which we wish to impose on others is wrong. Actually it should lead the way." 116 Cong. Rec. 19207 (1970).

Representative Skubitz: "In addition to all the things that are going to be required from private business, for the first time we are saying without equivocation that Federal installations

are going to have to live up to the rules that the Federal Government makes for others." 116 Cong. Rec. 19208 (1970).

Representative Rogers: "Furthermore, we have a provision about Federal-installation polluting. We direct that all Federal installations, who, incidentally, are some of the biggest polluters in this Nation, shall abide by the pollution laws, and the only way they can get an exception is to go to the Secretary /now the President/. . . . In other words, this is telling the Federal agencies: 'We want you to stop polluting the air, too.' " 116 Cong. Rec. 19211 (1970).

Supreme Court, U. S.
FILED
JUN 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, ex rel. ED W. HANCOCK, ATTORNEY GENERAL,

Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Amicus Curiae
State of New York
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7561

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
RICHARD G. BERGER
Assistant Attorneys General
of Counsel

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Interest of *Amicus*	1
Summary of Argument	3
POINT I—The Federal Clean Air Act does not exempt federal facilities which are sources of air pollution from compliance with federally-approved State permit procedures for control and abatement of air pollution	4
POINT II—Compliance by federal instrumentalities causing air pollution with air pollution control laws enacted and approved pursuant to federal law does not violate the supremacy clause	11
POINT III—The doctrine of sovereign immunity does not bar suit by a State to require a federal facility which is a source of air pollutants to comply with State permit requirements	14
A. Congress has consented to suit in § 118 of the Clean Air Act	14
B. The doctrine of sovereign immunity does not bar suit against a federal agent to compel him to perform a non-discretionary, ministerial duty to obey federal law	17
Conclusion	18

TABLE OF AUTHORITIES

Cases Cited: PAGE

Alabama v. *Seeber*, 502 F.2d 1238 (5th Cir. 1974) ..2, 4, 7, 8, 10, 12, 14, 16

California v. *E.P.A.*, —— F. 2d 7 E.R.C. 1667 (9th Cir. 1975) 16, 17

City of Milwaukee v. *Veterans Administration Center*, 357 F. Supp. 192 (E.D. Wis. 1973) 14, 15

Dugar v. *Rank*, 372 U.S. 609 17

Feres v. *United States*, 340 U.S. 135, 140 14

Getty Oil v. *Ruckelshaus*, 342 F. Supp. 1006 (D.C. Del. 1972), mod. on other gds. 467 F. 2d 349, cert. denied 490 U.S. 1125 .....13, 15, 16

In Re Grand Jury Proceedings, —— F. Supp. —— 7 Envir. Rptr. cases 1799 (W.D. Pa., 1975) 16

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 17

Malone v. *Bowdoin*, 369 U.S. 643 17

Mayo v. *United States*, 319 U.S. 441 ..... 3, 12

Minnesota v. *Hitchcock*, 185 U.S. 373 17

New York v. *O'Neill*, 359 U.S. 1 11

Steward Machine Co. v. *Davis*, 301 U.S. 548 11

Tcherepnin v. *Knight*, 389 U.S. 332 8

Train v. *Natural Resources Defense Council*, —— U.S. ——, 43 USLW 4467 ..... 5, 6

Union Brokerage Co. v. *Jensen*, 322 U.S. 202 12

U.S. v. *Champlin Rfg. Co.*, 341 U.S. 290 9

United States v. *King*, 395 U.S. 1 14

U.S. v. *Neifert-White Co.*, 390 U.S. 228 8

Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1 10

Washington v. *Udall*, 417 F.2d 1310 (9th Cir. 1969) 16

Statutes & Regulations Cited: PAGE

Air Quality Act of 1967 (Pub. Law 90-148, 81 Stat. 485) 5

1963 Clean Air Act (Pub. Law 88-206, 77 Stat. 392, Title I, § 101) 5

Clear Air Act Amendments of 1970, Publ. 91-604, 84 Stat. 1676,
42 U.S.C. §§ 1857-18571 ..... 1, 2

§ 110, 42 U.S.C. § 1857c-5 .....2, 3, 4, 6, 16, 18

§ 118, 42 U.S.C. § 1857f 3, 4, 5, 8, 9, 10, 12, 14, 16, 17, 18

§ 109 (42 U.S.C. § 1857 c-4) 3, 6

§ 116 (42 U.S.C. § 1857 d-1) 3, 9, 10

§§ 111, 112, and 114 (42 U.S.C. § 1857c-6, c-7 and c-9) 3, 9, 10, 12

§ 304 (42 U.S.C. § 1857 h-2) 4, 9, 12, 14, 15, 17, 18

§ 113 (42 U.S.C. § 1857c-8) 5, 9, 13

Social Security Act of 1935,
42 U.S.C. § 501-503 11

New York Environmental Conservation Law, Article 19,

40 C.F.R. § 52.02 13

40 C.F.R. § 52.920-.930 6

40 C.F.R. § 52.1076 and § 52.1077 13

40 C.F.R. § 52.1675 2

36 FR 158, Aug. 14, 1971 6

Kentucky Administrative Regulation No. AP-1, § 5 ..... 2, 6

New York Air Pollution Control Rule 201 2

Miscellaneous:

Cong. Rec., Vol. 116, Part 24, p. 32911 [Sept. 21, 1970] 2

Senate Report No. 91-1196, 91st Cong. 2d Sess. ..7, 8, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, ex rel. ED W. HANCOCK, ATTORNEY GENERAL,

Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus*

New York, as other states, has prepared a Clean Air Implementation Plan and passed new legislation in an effort to improve the quality of the air breathed by its citizens. New York Environmental Conservation Law, Article 19. It needs no underscoring at this late date to emphasize that air pollution has become a national problem of serious dimensions and a recognized health hazard. Congress itself has vigorously responded to this problem through enactment of the Clean Air Act, 42 U.S.C. §§ 1857-

1857l, which creates the federal machinery to insure that each state's Clean Air Implementation Plan meets vigorous standards, but expressly leaves the major enforcement responsibility in the hands of the states. See § 110, 42 U.S.C. § 1857c-5.

Central to New York's plan to control air pollution is its Air Pollution Control Rule 201 (6 NYCRR Part 201), 40 CFR § 52.1675 which requires that new and existing sources of air pollution obtain permits for construction and operation. The regulation is similar to Kentucky Administrative Regulation No. AP-1, § 5, involved in this case. Were these rules to be held inapplicable to federal installations, air quality could not be guaranteed in those states.

Emissions from federal installations are significant sources of air pollution in all parts of the Nation. New York, for example, has Army, Navy and Air Force installations as well as numerous other federal buildings located within its borders. Control of emissions from these sources is essential to clean air in New York. As former President Nixon stated in his 1970 message to Congress on the Environment (Cong. Rec., Vol. 116, Part 24, p. 32911 [Sept. 21, 1970]):

> "For years, many federal facilities have themselves been among the worst polluters."

New York's vital interest in insuring the protection and enhancement of its air quality prompts our deep concern with the outcome of this litigation. Should the courts conclude that federal installations are immune from the states' permit programs under the Clean Air Act a severe blow will have been dealt the effectiveness of that important statute—our citizens' first line of defense against contamination of our air.

New York has already participated as *amicus curiae* in *Alabama* v. *Seeber,* 502 F.2d 1238 (5th Cir. 1974), which

presented identical issues and in which the court held that § 118 of the Clean Air Act, 42 U.S.C. § 1857f, requires Federal sources of air pollution to comply with State air quality control permit procedures.

Summary of Argument

I. The Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, established a new program of federal-state cooperation for the control of air pollution. The federal government in § 109 (42 U.S.C. § 1857 c-4) sets overall air quality standards and charges the states with primary responsibility for their enforcement. Section 110 (42 U.S.C. § 1857 c-5). In § 118 (42 U.S.C. § 1857f) federal facilities are made subject to state and local air quality requirements "to the same extent as any person is subject to such requirements." Included among these requirements is the central regulatory scheme adopted by all states, the permit system. The legislative history of the Act makes it clear that Congress intended the states to regulate federal facilities with respect to air quality and the overall scheme of the Act demonstrates this as well. Section 116 (42 U.S.C. § 1857 d-1) uses the term "requirements respecting control and abatement of air pollution" just as § 118 does, to mean the entire control strategy of a state. Congress exempted certain federal facilities from state regulation in §§ 111, 112 and 114 (42 U.S.C. § 1857 c-6, c-7 and c-9). Had it intended to create other exemptions, it could have easily so specified.

II. The Supremacy Clause does not bar state regulation of federal facilities with respect to air quality controls. Congress specifically authorized state regulation in § 118 of the Clean Air Act, and this meets the test described in *Mayo.* v. *United States,* 319 U.S. 441, 448, that Congress "affirmatively declare" federal instrumentalities subject to state regulation. Sections 111 and 114 as well as 118 spe-

cifically discuss state regulation of certain federal facilities. Since violation of a state implementation plan is a violation of federal law as well as state law, the Supremacy Clause does not absolve federal facilities from compliance.

III. Likewise, the doctrine of sovereign immunity does not bar suit by a state to require federal facilities to comply with state air quality permit requirements. Congress consented to suit in § 118 when it declared federal agencies subject to state air quality requirements "to the same extent as any person." The court below mistakenly characterized the citizen suit provision in § 304 (42 U.S.C. § 1857 h-2) as the only express waiver of immunity from suit by the federal government in the Act. That provision, however deals only with citizen suits, not suits by a state to enforce its own air quality implementation plan.

Moreover, there is no federal immunity from suits to compel federal agencies to perform ministerial acts mandated by federal law. As § 110 and § 118, read together, require federal agencies to obtain state air quality permits, these agencies are mandated by Congress to obtain a permit and the federal courts have jurisdiction to so direct them.

POINT I

The Federal Clean Air Act does not exempt federal facilities which are sources of air pollution from compliance with federally-approved State permit procedures for control and abatement of air pollution.

The only issue in this case is whether federal facilities which are sources of air pollution are made subject to state air quality permit regulations by § 118 of the 1970 Amendments to the Clean Air Act (42 U.S.C. § 1857f). The court below held that federal facilities are exempt (Appendix p. 157), while the Court of Appeals for the Fifth Circuit, rejecting that view, held them subject to state regulation. *Alabama* v. *Seeber,* 502 F.2d 1238 (5th Cir. 1974). Thus there exists a clear dispute between circuits about the

applicability of § 118 of the Act to pollution caused by federally-operated sources.

This Court has recently interpreted the Clean Air Act Amendments of 1970 in *Train* v. *Natural Resources Defense Council,* —— U.S. ——, 43 USLW 4467, describing in detail the extensive cooperation between the Federal government and the states essential for this "comprehensive planning task of the first magnitude . . . to be accomplished in a relatively short time" (43 USLW 4469). Yet the decision below effectively excludes from regulation all federally-operated sources of air pollution by carrying out an exemption which nowhere appears in the Act. In this legislation, Congress exerted its powers in a comprehensive way to control the emission of harmful substances into the air. Yet the preamble "that the prevention and control of air pollution at its source is the primary responsibility of the states and local governments" remained unchanged from the 1963 Clean Air Act (Pub. Law 88-206, 77 Stat. 392, Title I § 101).

The 1970 amendments departed sharply from the former course of federal involvement in air pollution control. Instead of encouraging states to cooperate in interstate compacts for the control of air pollutants, as in the Air Quality Act of 1967 (Pub. Law 90-148, 81 Stat. 485), Congress devised a master plan to oversee air quality control nationwide. As described in detail in *Train* v. *Natural Resources Defense Council, supra,* the amendments of 1970 gave the U. S. Environmental Protection Agency (EPA) authority to require states "to obtain air quality of specified standards • • • within a specified period of time." 43 USLW 4468. In the alternative, the EPA can enforce these air quality standards itself. Section 113 (42 U.S.C. 1857c-8).

The question before this Court is whether Congress intended federal facilities which are sources of air emissions to be immune from state air quality control permit requirements. The overall design of this unique and complicated

Act and in the legislative history which evolved it demonstrates the clear congressional intent to authorize the states to enforce the Act against all emission sources, whether operated by private interests, municipalities, the states themselves, or federal agencies—a result dictated by public health needs and by simple fairness.

In Section 110 of the amendments (42 U.S.C. § 1857c-5), the basic requirements for the states under the Act and the relationship between them and the federal government are defined. While the federal government sets overall air quality standards for the United States (§ 109, 42 U.S.C. § 1857c-4), the states are responsible for implementation of these goals under criteria set forth in § 110. States are required to prepare plans to meet air quality standards, which must include strategies, laws and regulations to control, monitor and inspect all emission sources as well as land use and transportation strategies if necessary—plans which are then subject to federal accounting as well as periodic review to ensure their adequacy and comprehensiveness. See § 110c (42 U.S.C. § 1857c-5[c]); *Train* v. *N.R.D.C., supra,* 43 USLW 4467, 4468.

A permit program to control stationary sources of air pollution such as Kentucky Administrative Regulation No. AP-1, § 5, 40 C.F.R. § 52.920-.930, has been adopted by every state in the Union. See 40 C.F.R. Part 52. The Act clearly envisages permit systems as a control strategy. In fact, the original draft regulations of the U. S. Environmental Protection Agency required every implementation plan to include a permit system. 36 FR 158, Aug. 14, 1971. Section 110 (a)(2)(B) states that a plan must include:

> "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to ensure attainment and maintenance of such primary and secondary standard . . ."

The task of inventorying emission sources in an air quality control region, gathering information about their processes

and emissions, and then setting emission limitations and compliance schedules for them would have been unfeasible if the burden were not placed upon the sources to come forward with the necessary information for certification. The permit systems of Kentucky and other states are therefore central to the accomplishment of the objectives of the Act. *Alabama* v. *Seeber,* 502 F.2d 1238, 1243.

The federal agencies do not challenge the legitimacy of state permit programs. Instead they seek blanket exception for all federal facilities which are sources of emissions. As part of this contention they allege, and the District Court below agreed (App. 136) "that a permit has absolutely nothing to do with air quality." This proposition is unsupportable, especially since the Administrator has specificially approved permit systems as a control strategy. To argue that Congress has authorized the states to enact plans subject to federal EPA approval to curtail air pollution within their borders but that certain emissions, while harmful, are beyond regulation, recalls George Orwell's dictum that some animals are more equal than others.

Congress was sensitive to the issue of federal-state relationships in drafting this Act. The problem of federally established air quality standards being administered by state officials was recognized by Congress. The Senate Report states,

> "The Committee does not intend to diminish either the authority or responsibility of state and local governments. As is clear in sections 111 [later 110], 113 [later 111] and 114 [later deleted] the states would be expected to have or obtain adequate authority to ensure that the provisions of the Act are enforced." Senate Report, 91-1196 at p. 21.

As to federal facilities which were sources of emissions, Congress expressly found that:

> "Federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to

develop control measures . . ." Senate Report 91-1196 91st Cong., 2d Sess. at p. 37.

Congress explicitly rejected self-enforcement of new emissions limitations by federal facilities as not consonant with protection of the public health. Federally-caused emissions were made subject to the full requirements of the Act in a separate section, § 118 (42 U.S.C. § 1857f), which states:

> "Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having any jurisdiction over any property, a facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution *to the same extent that any person is subject to such requirements.*" (Emphasis supplied)

No clearer pronouncement of Congress' intent could have been devised. As the court stated in *Alabama* v. *Seeber, supra,* this section "conveys a Congressional intent that federal facilities are to be treated equally with private facilities in the scheme of control established by the Act." 502 F.2d at 1243. From the very design of the Act, it was necessary for federal facilities to be subject to state air pollution regulations, including permit regulations, because the states were assigned the duty of implementing the Act in the first instance. This Court should give the statute a construction consistent with its plain and clearly-expressed meaning, *U.S.* v. *Neifert-White Co.,* 390 U.S. 228, 232; *Tcherepnin* v. *Knight,* 389 U.S. 332, 336, particularly where, as here, the Act is a remedial one and one designed to protect the public interest. *U.S.* v. *Champlin Rfg. Co.,* 341 U.S. 290, 298.

The strained construction of § 118 urged by respondents is inconsistent with related portions of the Act. The

phrase "requirements respecting control and abatement of air pollution" used in § 118 is a term of art which is also used in § 116 (42 U.S.C. § 1857d-1), to distinguish from emission limitations. "Requirements respecting control and abatement of air pollution" means all other control strategies for air pollution, such as monitoring, inspection and permits. And § 116 specifically provides that the States are not preempted from utilizing any of these enforcement methods. Read in conjunction with § 118, permitting the states to enforce these "requirements" as against Federal polluters, the Act clearly means that permit procedures are available to the States to regulate Federally-maintained sources of pollution. Federal facilities are elsewhere made subject to suit for violation of "an emission standard or limitation" in § 304(a)(1) of the Act (42 U.S.C. § 1857h-2 [a][1]). The term "requirements" is a broader term and is used in § 118 to encompass state administrative regulation of federal facilities, and therefore permit programs.

In several other sections of the Act, Congress was careful to exempt federal facilities from state control. Section 111 (42 U.S.C. § 1857c-6) deals with the special problem presented by the construction of certain types of new sources which pose significant air pollution problems, such as fossil-fuel power plants, smelters and foundries. These new sources are subject to standards of performance set by the Administrator based upon the latest control technology.* While the Administrator may delegate his powers under § 111 to a state, § 111(c)(1) prohibits such delegation "with all respect to new sources owned or operated by the United States." The design and performance of new federal sources is completely at the discretion of the federal government. In contrast, other federal facilities must meet state requirements. Similarly, in § 114 (42 U.S.C. § 1857c-9), new federal facilities are exempted from state monitoring and inspection if the Administrator has gen-

---

* The term "new sources" here describes only those new sources to which a standard of performance applies. 111(a)(2) (42 U.S.C. § 1857c-6[a][2]).

erally delegated those powers to a State; and in § 112 (42 U.S.C. § 1857c-7), the Administrator is prohibited from delegating his authority to control certain especially hazardous emissions not included in ambient air quality standards with respect to all federal facilities. This Court should apply the doctrine of *expressio unius est exclusio alterius. Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22. As Congress has taken pains to exempt federal sources of emissions from state control in some instances, it must be assumed that if it had intended to exempt federal facilities in all cases, it would have done so. *Alabama* v. *Seeber, supra,* at 1244.

The Court below, in holding federal facilities exempt from state permit requirements, made much of the distinction between "substantive" emission limitations and other administrative air quality procedures such as permits (App. 165), concluding the former were applicable to federal facilities and the latter were not. But the court totally misread § 118, which plainly states that Federally-maintained sources are subject to State "requirements respecting control and abatement of air pollution"—a term which includes permit programs (see § 116).

Moreover, the monitoring and inspection procedures required by § 114 are certainly as much "administrative regulations" as permit requirements. Congress found it acceptable for state officials to be delegated the authority to require all federal sources other than new ones to be subject to federally-approved state regulations regarding emission records, installation of monitoring equipment and entry for inspection. Thus Congress certainly intended for states to monitor and inspect federal facilities, yet respondents argue that those facilities are exempt from state permit procedures. The fallacy of this argument is self-evident and it should be rejected. As the court in *Alabama* v. *Seeber, supra,* stated, "the substantive-procedural overlay" adopted by the court below in an effort to distinguish between emission standards and permit programs "draws no sustenance from the Act itself" and is merely "a semantical red herring." 502 F.2d at 1245.

POINT II

Compliance by federal instrumentalities causing air pollution with air pollution control laws enacted and approved pursuant to federal law does not violate the supremacy clause.

The court below held that "[i]n the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff" (App. 165). This holding was based upon a misunderstanding of the workings of the Act and of the Congressional intent.

There can be no violation of the Supremacy Clause where, as here, Congress explicitly authorized state regulation of federal installations under a federal act. The scheme of the Act is that ambient air quality standards are set by the federal government but stationary source regulation, including the permit program and emissions limitations, is delegated to the states. This is permissible under our federal system and is a method followed in many areas of law enforcement. For example, the Social Security Act of 1935, 42 U.S.C. § 501-503, which established a federal program of unemployment insurance administered by the states, was held constitutional in *Steward Machine Co.* v. *Davis,* 301 U.S. 548, against an attack on the grounds that the Act violated the federal-state relationship as defined in the Tenth Amendment. And as Mr. Justice FRANKFURTER said in *New York* v. *O'Neill,* 359 U.S. 1, 11, involving reciprocal state agreements to extradite witnesses for criminal proceedings:

> "The manifold arrangements by which the Federal and State Governments collaborate constitute an extensive network of cooperative governmental activities not formulated in the Constitution but not offensive to any of its provisions or prohibitions."

As this Court has noted, "[W]here the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co* v. *Jensen*, 322 U.S. 202, 209.

In *Mayo* v. *United States*, 319 U.S. 441, 446, this Court held that "[i]t lies within congressional power to authorize regulation, including taxation, by the state of federal instrumentalities." Under the Clean Air Act the states act in effect as agents of the federal government and are explicitly awarded the authority to regulate federal facilities. Section 118 provides that federal agencies must comply with state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." This provision fully satisfies the test, enunciated in the *Mayo* case, *supra*, 319 U.S. at 448, that Congress must "affirmatively declare" federal instrumentalities or property subject to state regulations. *Alabama* v. *Seeber*, *supra*, 502 F.2d at 1247-1248.

Likewise, § 114, as we have shown, authorizes the Administrator to delegate to the states authority to monitor and inspect all but new federal facilities. And § 304 makes federal sources subject to citizen suits for violation of "an emission standard or limitation" or "an order issued by the Administrator or State with respect to such a standard or limitation * * *." It is odd that defendants insist in the face of these repeated instances of Congressional delegation to the states that the Supremacy Clause bars state action here. And it would have been anomalous for the authors of the Act to have given the states such powerful authority over air pollution within their borders and then denied them authority over federal sources within those same states' borders.

Further, the refusal of TVA, Army and Atomic Energy Commission to comply with Kentucky's permit program is a federal offense. The Act commands the states to devise plans to implement the national ambient air quality stand-

ards set by the Administrator. The Administrator must then approve each plan and promulgate his approval as a regulation (40 C.F.R. § 52.02). The effect of his action in approving a state plan is to make it federal law as well. This eliminates any issue under the Supremacy Clause. A state official in regulating a federal facility is merely acting in his capacity as a federal agent, pursuant to federal law. This point is clearly shown by the Administrator's power to disapprove state implementation plans and his subsequent promulgation of replacement provisions. In such cases state officials in enforcing an implementation plan will be acting solely pursuant to federal law. (See 40 C.F.R. § 52.1076 and § 52.1077 where the Administrator promulgated replacement provisions for new source review and source surveillance for the State of Maryland).

Section 113(a)(1) (42 U.S.C. § 1857c-8[a][1]) also demonstrates that state plans have the status of federal law. It provides:

> "Whenever * * * the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, * * * the Administrator may issue an order requiring such person to comply with the requirements of the plan or he may bring a civil action * * *."

This empowers the Administrator to enforce by order or civil suit any part of an applicable state implementation plan. If the plans were only state law and not federal law, the Administrator would have no authority to enforce them. See *Getty Oil* v. *Ruckelshaus*, 342 F. Supp. 1006, 1017 (D.C. Del. 1972), mod. on other gds. 467 F. 2d 349, cert. denied 409 U.S. 1125:

> "In the terminology of the statute and regulations, Delaware Regulation XV is a part of the compliance schedule incorporated in Delaware's Implementation Plan. It received federal approval and violation

thereof is a federal crime enforceable by the Administrator."

Moreover, the statute provides (§ 304) that if a citizen sues to enforce a provision of a state plan, that action is considered one involving a federal question and is to be brought in a federal district court.

Thus, when the defendants refused to comply with Kentucky's permit regulation, they were in violation of federal law, and the Supremacy Clause did not absolve them from compliance.

POINT III

The doctrine of sovereign immunity does not bar suit by a State to require a federal facility which is a source of air pollutants to comply with State permit requirements.

A. Congress has consented to suit in § 118 of the Clean Air Act.

It is fundamental that Congress through legislation may consent to suit against federal instrumentalities in all or some cases, *Feres* v. *United States,* 340 U.S. 135, 140. Section 118 of the Clean Air Act constitutes such consent.

The threshold question here is whether Congress acted in such a manner as to unequivocally consent to be sued for violations of state permit regulations. *United States* v. *King,* 395 U.S. 1. Section 118 declares that all federal agencies "shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." As any person may be required by legal action to comply with state permit requirements, § 118 declares that federal agencies shall likewise be subject to state permit requirements and enforcement proceedings. *Alabama* v. *Seeber, supra,* 502 F.2d at 1244; *City of*

Milwaukee v. *Veterans Administration Center,* 357 F. Supp. 192, 193 (E.D. Wis. 1973). This is not surprising in light of the scheme of the Act, making state permit procedures federal law and state officials in effect federal agents in carrying out the Act. *Getty Oil* v. *Ruckelshaus, supra.*

The court below mistakenly pointed to § 304 as the only consent by the federal government to be sued (App. 164):

> "Section 118 contains no waiver [of sovereign immunity] and that included in section 304 does not permit suit to require owners and operators of federal facilities to obtain permits from a state agency in order to continue to operate. The two sections are part of the same Act and must be read together. By failing to include a separate waiver of immunity in section 118 Congress indicates that compliance with its provisions may be compelled only to the extent permitted by section 304."

Section 304 of the Act (42 U.S.C. § 1857h-2), provides for citizen suits to enforce (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such standard or limitation (§ 304[a][1]). Federal facilities as well as state and private facilities are subject to such suit. This section meshes perfectly with § 118, as the Senate Report 91-1196, points out:

> "As recognized under section 118 of the bill, Federal facilities generate considerable air pollution. Since federal agencies have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 118." at p. 37.

Citizen suits were not intended to be the first line of enforcement, but only to furnish reinforcement if governments refuse to act. Consequently, citizen suits are confined to suits for violations of emissions limitations. The Court said in *Alabama* v. *Seeber, supra,* 502 F.2d at 1248:

> "The 'Citizen Suits' heading of section 304, the fact that section 304(d) provides for awarding attorney fees, and the legislative history of the section demonstrates that the congressional focus in enacting that provision was on suits by private parties."

But state enforcement procedures are not so limited. Violations of implementation plans are violations of state law as well as federal law, *Getty Oil* v. *Ruckelshaus, supra,* 342 F. Supp. 1006, mod. on other gds. 467 F.2d 349, cert. den. 409 U.S. 1125; *In Re Grand Jury Proceedings,* —— F. Supp. —— 7 Envir. Rptr. Cases 1799 (W.D. Pa. 1975). The states are expressly required to be able to enforce all of their air quality regulations, including permit procedures, § 110(a)(2)(f)(i) (42 U.S.C. § 1857c-5[a][2][f][i]). The Act does not contemplate that states will be limited to the use of § 304 as a means for enforcement. As the court pointed out in *Alabama* v. *Seeber, supra,* 502 F.2d at 1248, "Section 304 cannot be properly read as implying anything about the ability of states to sue under § 118."

Finally, it is clear that one purpose of the § 118 was to shift from a program of voluntary to a mandatory program for federal facilities which were sources of air pollution. *Alabama* v. *Seeber, supra,* 502 F.2d at 1245. The burden placed upon federal instrumentalities is slight for compliance with state permit procedures, as discussed above. See *Washington* v. *Udall,* 417 F.2d 1310 (9th Cir. 1969). In any case, the President can exempt a federal facility from state regulations if they are too burdensome, § 118. Although Congress clearly expressed its intent on this issue, the Court below thwarted that intent by making it unenforceable. As pointed out in *California* v. *E.P.A., supra,*

—— F.2d ——, 7 Envir. Rptr. Cases 1667, 1675 (9th Cir. 1975).

> "Where a construction finding a waiver of exclusive federal jurisdiction would support the stated congressional purpose, then it seems to us that a purported waiver should be construed, if not liberally, at least sensibly." See H. Hart and H. Wechsler, The Federal Courts and the Federal System, p. 1351 (2d Ed. 1973).

B. The doctrine of sovereign immunity does not bar suit against a federal agent to compel him to perform a non-discretionary, ministerial duty to obey federal law.

This Court in *Minnesota* v. *Hitchcock,* 185 U.S. 373, 387, long ago stated that the doctrine of sovereign immunity "does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law and which they wrongfully neglect or refuse to perform." Since then many other decisions of this Court have held that the doctrine does not apply where a Federal agent or agency has violated non-discretionary duties under a federal statute. See *Dugan* v. *Rank,* 372 U.S. 609; *Malone* v. *Bowdoin,* 369 U.S. 643; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682.

As we have described above, § 118 imposes a clear duty upon federal agencies to comply with state "requirement respecting control and abatement of air pollution," including permit requirements. Just as a private owner of emissions sources, federal sources have no discretion as to whether they must seek a permit if the Implementation Plan so mandates, and the federal judiciary has ample power to so direct.

The court below declared that the waiver of immunity in § 304 to sue the Administrator is not applicable since

(App. 168) the court had

> "no power to review the decision of EPA not to commence actions under section 113 since this was a decision on 'agency action committed to agency discretion by law.' "

But this argument misses the point. The nub of this action is to enforce the permit procedures against the TVA and other Federal sources themselves, not to mandamus the EPA. Section 118 gives no discretion to officers in control of federal air pollution sources as to whether to comply with state permit procedures. They "to the same extent as any other person" are required to comply with valid state regulations approved under § 110 of the Act, including permit requirements. If they seek to avoid compliance with the implementation plan of the state where they are located, they must seek a variance, not defy it outright.

CONCLUSION

The order appealed from should be reversed and the plaintiff's motion for summary judgment should be granted.

Dated: June 10, 1975, New York, New York.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for *Amicus Curiae*
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
RICHARD G. BERGER
Assistant Attorneys General
of Counsel

NOTE: Walter F. Morris, III, legal assistant, also participated in the preparation of this brief.

Supreme Court, U. S.
FILED
JUL 1 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL.
ED W. HANCOCK, ATTORNEY GENERAL,
Petitioner,

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ANDREW P. MILLER
Attorney General of the Commonwealth of Virginia, Amicus Curiae

J. THOMAS STEGER
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT

I. The Language Of Section 118 Of The Clean Air Act Is Not Restricted To Only Emission Standards Or Standards Of Performance, But Encompasses All Requirements Respecting The Control and Abatement of Air Pollution 4

II. A State Permit System Is A Requirement Respecting The Control And Abatement Of Air Pollution. 8

CONCLUSION 12

TABLE OF CITATIONS

Cases

Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U.S. 552 (1932) 4

Petition of Public Nat. Bank of New York, 278 U.S. 101 (1928) 7

Train v. NRDC, 43 U.S.L.W. 4467 (U.S. April 16, 1975) 7, 9

Statute

FEDERAL

Clean Air Act of 1970, 42 U.S.C. §§ 1857 et seq. 1, 3, 4, 6, 11

In The

Supreme Court of the United States

October Term, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL.
ED W. HANCOCK, ATTORNEY GENERAL,
Petitioner,

V.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The interest of the Commonwealth of Virginia is to seek a determination that the use of permits, when included in a State's program of air pollution control measures, constitutes a requirement which is applicable to federal facilities under Section 118 of the Clean Air Act.

In its program for the achievement and maintenance of ambient air quality standards, Virginia relies on a registration and permit process similar to that of Kentucky. Under paragraph 2.03 of the regulations of the Virginia Air Pol-

lution Control Board all persons owning or operating any existing source of pollution shall have registered such source operation with the Board by June 30, 1972. Under paragraph 2.04 of the regulations any source in existence at the time the regulations became effective shall have been in compliance by June 30, 1972. If compliance was not possible by that date, the person responsible for the operation of that source shall have submitted to the Board, by the same date, a control program and schedule containing a date when full compliance will be achieved.

New sources, defined as those constructed after March 17, 1972, and the modification, after this date, of any source are governed by paragraph 2.06 of the regulations. This paragraph prohibits the commencement or modification of a source until there is first obtained from the Board a permit to construct and operate the source.

Applications for permits from the Virginia Board must include such information as may be required by the Board to determine the effect of the proposed source on the ambient air quality and also to determine compliance with the applicable emission standards. Prior to issuing a permit, the Board must be satisfied that the source will be constructed or modified without causing a violation of the applicable regulations. The Board must also be satisfied that the proposed source can be designed and built in accordance with the utilization of the best available control technology. Additionally, the Board must be satisfied that the proposed source will not compromise the attainment or maintenance of an applicable ambient air quality standard. Finally, an application for a permit must be subject to a public hearing.

In addition to permits for new or modified sources, Virginia has special regulations which require permits for outdoor burning in Standard Metropolitan Statistical Areas. There are no emission standards or standards of performance for such open burning. The issuance of an open burning permit depends upon a determination whether the burning will cause a health or traffic hazard, and whether the material to be burned can be disposed of by other means. Frequently, these permits contain special terms which are tailored to each unique situation.

Virginia's regulations apply to departments and agencies of the Federal government. There are many facilities in Virginia which are owned and operated by such departments and agencies, which engage in activities which result or may result in the discharge of air pollutants. Among these are the Pentagon, Forts Belvoir, Eustis, Lee and Meyer, the Naval Base at Norfolk and the Marine Base at Quantico. These and other Federally operated sources have submitted to the Board registration forms and compliance programs, while at the time stating that application for permits would not be made.

SUMMARY OF ARGUMENT

The plain language of Section 118 of the Clean Air Act states that Federal agencies are required to comply with state requirements to same extent that any person is subject to such requirements. The defendants cannot obfuscate that clear language by imposing upon it their invented distinction between "substantive" and "procedural" requirements. That distinction is not justified by any section of the Clean Air Act or by any reference to its legislative history.

A state permit is an essential requirement for the control and abatement of air pollution. Section 304 of the Clean Air Act, which is the "citizen suit" provision, does not provide a sufficient means for a state to carry out its goal of achieving and maintaining clean air.

ARGUMENT

I.

The Language Of Section 118 Of The Clean Air Act Is Not Restricted To Only Emission Standards Or Standards Of Performance, but Encompasses All Requirements Respecting The Control And Abatement Of Air Pollution.

The first sentence of Section 118 of the Clean Air Act of 1970, 42 U.S.C. § 1857f, states:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

The question presented in this case is, therefore, does the permit system adopted by the Kentucky Air Pollution Control Commission constitute one of these "requirements respecting control and abatement of air pollution."

In construing these words of Section 118, the general rule is that the legislature must be presumed to use words in their known and ordinary signification. *Old Colony R. Co.* v. *Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932). The word "requirement" is self-explanatory. The ordinary meaning of "respecting" is "with regard or relation to." Webster's Third New International Dictionary, G. & C. Merriam Co. (1968). Therefore, the applicability to Federal agencies of Kentucky's permits, which are clearly requirements, must be judged with regard or relation to the effect of these permits on the control and abatement of air pollution.

All of the defendants herein contend that the phrase "requirements respecting control and abatement of air pollution" means simply that Federal facilities must comply with the emissions standards and "substantive" portions of implementation plans of Sections 109 and 110 of the Clean Air Act, and, except for new facilities, the monitoring and other requirements of Section 114. Defendants further contend that permit systems are merely "procedural" and consequently have nothing to do with the control and abatement of air pollution. Defendants argue that the legislative history of the Act supports their interpretation. The Courts below agreed with the defendants.

We would respectfully submit that the analysis of the legislative history made by the defendants and the Courts below is erroneous. The legislative history of Section 118 does not inexorably lead to the conclusion that the "requirements" in question mean only emissions and air quality standards. The version of Section 118 passed by the House of Representatives would have required Federal facilities to comply with State and local emission standards. H.R. 17255, 91st Cong., 2d sess., sec. 111 (1970). The Senate-passed version would have required Federal facilities to comply with the "requirements" of this Act. S. 4358, 91st Cong., 2d sess., sec. 118 (1970). The Senate Report on the bill states, "This section requires that Federal facilities meet the emission standards necessary to achieve ambient air quality as well as those established in other sections of Title I." S. Rept. No. 91-1196, 91st Cong., 2d sess., p. 23 (1970). The final language of Section 118 emerged from the Conference Committee. Concerning this new and final language the conference report stated, "The House bill and the Senate amendments declare that Federal departments and agencies should comply with applicable standards

of air qualtiy and emissions." H. Rept. No. 91-1783, 91st Cong. 2d sess., p. 48 (1970).

Since the various reports refer just to standards of air quality and emissions, defendants appear to be urging that the maxim "expresio unius est exclusio alterius" applies through the reports to the statute itself. But Section 118 does not use the words "emission standards"; it speaks of state and local requirements respecting the control and abatement of air pollution. This language is broader and more inclusive than the words "emission standards."

Such State requirements are to be found in the State implementation plans, the context of which is governed by Section 110 of the Clean Air Act. Under subparagraph (a)(2)(B) of this Section, the plans, which provide for the implementation, maintenance and enforcement of ambient air quality standards, must include not only emission limitations and compliance schedules but "such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." Thus, if a particular State's permit system can be determined to be a measure which is necessary to insure attainment and maintenance of an air quality standard, it is clearly a requirement respecting the control and abatement of air pollution just as are emission limitations or standards. Surely, land-use and transportation controls, could not be effectuated by emission controls alone, but would necessarily depend upon some other regulatory scheme, such as permits involving the use of land.

The full intent of the phraseology used in Section 118 is further clarified by reference to Section 116 of the Clean Air Act. That Section provides in part:

> ". . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof

> to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; . . ." 42 U.S.C. 1857d-1.

Clause (2) of this Section is essentially the same as that found in Section 118. It is a cardinal rule of statutory construction that a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence or words shall be superfluous, void or insignificant. *Petition of Public Nat. Bank of New York,* 278 U.S. 101 (1928). Therefore, in accordance with this rule of construction, the phrase "any requirement respecting control or abatement of air pollution" must be construed as meaning more than a mere redundant expression of the clause "any standard or limitation respecting emission of air pollutants."

It should also be noted that Federal agencies have not been recalcitrant in seeking relief under State "procedures," when it works to their advantage. For instance, Virginia's regulations expressly provide that all sources were to be in compliance with categorical emission limitations on June 30, 1972. This requirement is the same as that found in the Georgia plan, which was discussed by this Court in *Train* v. *NRDC,* 43 U.S.L.W. 4467 (U.S. April 16, 1975). But, as this Court stated in *Train,* the Georgia plan "incorporated a variance procedure whereby particular sources could obtain individually tailored relief from general requirements." *Id.* at 4469. Virginia incorporated a similar procedure for relief from the 1972 compliance date; the source may submit, to the Virginia Board, a compliance schedule which, when approved by the Board, permits deferred compliance. Obviously, the interim timetables and circumstances for each such schedule are not spelled out as "substantive" regulations, but are worked out "administratively" between the Board and the source. Also, the compliance schedule, as

a specific revision to the initial plan, is subject to a public hearing conducted by the Board's staff. Needless to say, some Federal agencies have opted for this deferral procedure, and are now under compliance schedules. These Federal agencies, however, should have been in complete compliance with the emission standards in 1972, if they wish to be consistent with their "substantive/procedural" hypothesis. The actual inconsistency of their behavior reveals the senselessness of relying on mere semantical differences.

II.

A State Permit System Is A Requirement Respecting The Control And Abatement Of Air Pollution.

A permit system is an effective and necessary tool in achieving and maintaining clean air. The permit system facilities identification and evaluation of the source's need for air pollution control equipment. It insures that existing or proposed air pollution control devices be of sufficient collection efficiency to minimize potential air pollution. It prevents the construction or modification of uncontrolled sources. An applicant for a permit is expected to make any necessary changes on the drawing board, rather than on the physical plant itself. It is to the applicant's financial advantage to come forward with its control proposals and plans at a stage when review and correction, if needed may be more easily accomplished.

The permit system specifies and clarifies the source owner's pollution control responsibility in one action. Litigation over an alleged violation of emission standards, or other factors, during which the public might suffer the effects of air pollution, is avoided. Of course, if a permit is denied to an applicant, he may seek judicial review. This litigation, however, is carried out on the applicant's time,

not the public's, for until a permit is issued, the applicant cannot operate the source. *See Train, id.* at 4477.

Furthermore, the permit system will prevent a source from possibly degrading the air below an air quality standard. It can be used to allocate available clean air among several sources, and equalize the burden of pollution control. It would be an important consideration in any administrative program which depends upon flexibility and ingenuity to deal with problems of allocation. *See Train, id.* at 4477.

The Circuit Court of Appeals below did not ignore the need and power of the States to control air pollution from Federal sources. It stated, however, that these elements could be satisfied by proceeding under Section 304 of the Act, which is the "citizen suit" provision. The Court below believed that this Section could not only be used to abate pollution, but to prevent it as well, by bringing an action whenever a Federal source failed to meet a level prescribed in a schedule or timetable of compliance.

We do not believe that Section 304 provides a satisfactory solution. In the first place, if the State permit requirement is eliminated with respect to Federal sources, and if Section 304 is the sole means of challenging the sufficiency of Federal pollution control efforts, then, in essence, these Federal agencies are allowed to license themselves, in accordance with their own determination as to what the State requires, and the judiciary, not the expert regulatory agency, becomes the judge of the accuracy of these determinations. The traditional role of the judiciary, as the reviewer of decisions made by expert regulatory agencies, is set aside and instead the judiciary becomes the primary trier of fact. The expert regulatory agency looses that initial element of decision-making which has become the hallmark of modern administrative process, and to which, under a permit system, all sources would be subject.

Secondly, exclusive reliance on Section 304 would require the State agency to make a Federal case out of every suspected violation or questioned act of the Federal source, including those doubts regarding the Federal source's evaluation of its proposed conformance to the State standards. This will either result in an inordinate burden upon the judiciary, or it will encourage the State to suppress those doubts and questions. The objective of insuring that Federal sources fulfill their pollution control responsibilities is not served in that fashion. And it must always be remembered that, during the pendency of this litigation, which can be complex and lengthy, the Federal source would be operating and putting out possibly dangerous levels of pollution. That would be avoided if the Federal source would wait, like everyone else must, until its proposed operation has been approved and permitted by the State agency.

To deprive the State of its permit requirement and to insist that all efforts to control Federal sources must be brought under Section 304, is also to deprive the state's citizens of an opportunity to voice their concern in an inexpensive and efficient proceeding. This opportunity is the public hearing, which some states, including Virginia, require before a permit is issued. These public hearings sometimes provide information which both the State agency and the Federal source may not be aware of. Federal sources should not fear these public hearings for permits, because public hearings are also a requirement for specific revisions or variances to emission limitations, which Federal sources have requested, and can be expected to request, from time to time.

Finally, Section 304 is of no value in either preventing or abating open burning violations. There are no emission standards or standards of performance applicable for open

burning. In Standard Metropolitan Statistical Areas, where permits are required, the criteria involves the effects on local health and traffic, and also a consideration of alternate means of disposal of the substance desired to be burned. Furthermore, Section 304 requires that the alleged violators be given 60 days' notice before an action is commenced. Most open burning, however, can be completed within a few days. The damage, if any, has been done before a suit can be commenced. A permit system minimizes problems resulting from open burning, which, to many citizens, is one of the most evident and bothersome aspects of the total spectrum of air pollution.

It is submitted, therefore, that a permit system ought to be regarded as a requirement respecting the control and abatement of air pollution, and which is thus expressly made applicable, under Section 118, to federal sources. The distinction between "substantive" and "procedural" requirements, which the Courts below accepted, and gave effect to, in a summary fashion, is irrelevant, and not justified by the language of the Clean Air Act.

CONCLUSION

The order appealed from should be reversed and the plaintiff's motion for summary judgment should be granted.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of the Commonwealth of Virginia, Amicus Curiae

J. THOMAS STEGER
Assistant Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1975.

Supreme Court, U. S.
FILED
1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-220

COMMONWEALTH OF KENTUCKY, *ex rel.* ED W. HANCOCK, Attorney General, *Petitioner,*

vs.

RUSSELL E. TRAIN, Administrator, ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief of the California Attorney General, California Air Resources Board and Georgia Attorney General as Amici Curiae in Support of Petitioner.

EVELLE J. YOUNGER,
Attorney General,
ROBERT H. O'BRIEN,
CARL BORONKAY,
Assistant Attorneys General,
NICHOLAS C. YOST,
RODERICK WALSTON,
DANIEL TAAFFE,
C. FOSTER KNIGHT,
Deputy Attorneys General,
C. FOSTER KNIGHT,
Deputy Attorney General,
110 West "A" Street, Suite 600,
San Diego, Calif. 92101,
(714) 236-7349,
Attorneys for Amicus Curiae State of California.

ARTHUR K. BOLTON,
Attorney General of the State of Georgia,
ROBERT E. HALL,
Assistant Attorney General,
132 State Judicial Building,
Atlanta, Georgia 30334,
(404) 656-3391,
Attorneys for Amicus Curiae State of Georgia.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Interest of Amicus Curiae, State of California 1

Summary of Argument 4

Argument 6

Introduction 6

I

Federal Facilities Must Comply With State and Local Permit Requirements for Controlling and Abating Air Pollution 9

A. Successive Amendments to the Clean Air Act Show That Congress Has Increasingly Subjected Operators of Federal Facilities to Federal, State and Local Control Authority 9

B. Permit Requirements Are "Requirements Respecting Control and Abatement of Air Pollution" With Which Federal Facilities Must Comply 12

C. State and Local Permit Requirements Are Integral and Necessary Elements of Implementation Plans for Controlling Stationary Sources of Air Pollution, Including Federal Facilities 18

II

The Supremacy Clause and Sovereign Immunity Doctrine Do Not Insulate Federal Facilities From State and Local Permit Requirements 20

A. The Supremacy Clause Is Inapplicable to Bar State Permit Requirements 20

Page

B. Federal Facilities Are Not Immune From State Suits Enforcing Section 118 21

C. State and Local Permit Requirements in Approved State Implementation Plans Are Binding on the Federal Government; Federal Stationary Sources Must Comply With Such Permit Requirements 22

D. Permit Requirements Do Not Constitute a Significant Additional Burden on Federal Facilities 24

III

The Complementary Nature of the Clean Air Act and the Water Pollution Control Act, and the Near Identity in Both Acts of Provisions Controlling Federal Facilities, Requires a Uniform Interpretation in Both Acts That the Term "Requirements" Encompass Permit Systems in Approved Pollution Control Plans 26

Conclusion 32

TABLE OF AUTHORITIES CITED

Cases — Page

Air Terminal Services Inc. v. Rentzel, 81 F.Supp. 611 (ED Va, 1949) 23

Alabama v. Seeber, 502 F.2d 1238 (5th Cir. 1974) 3, 6, 7, 8, 9, 11, 13, 21, 22, 26

Appalachian Power Co. v. EPA, 477 F.2d 495 (10th Cir. 1973) 22

California v. EPA, ... F.2d ....; 7 E.R.C. 1667 (9th Cir. 1975) 8, 17, 26, 29, 30

California v. Stastny, No. 72-2905 (9th Cir., appeal docketed Nov. 6, 1972) 3

County of Milwaukee v. Veterans Administration Center, 357 F.Supp. 192 (E.D. Wis., 1973) 21

Gauley Mountain Coal Co. v. Bureau of Mines, 224 F.2d 887 (4th Cir. 1955) 23

Kentucky v. Ruckelshaus, 497 F.2d 1172 (6th Cir. 1974) 3, 7, 8, 9, 31

Mattz v. Arnett, 412 U.S. 481 (1973) 26

Mayo v. United States, 319 U.S. 441 (1943) 20

NLRB v. Plasterers Local Union No. 79, 404 U.S. 116 (1971) 8

RFC v. Beaver County, 328 U.S. 204 (1946) 23

Smayda v. United States, 352 F.2d 251 (9th Cir. 1965) 23

United States v. Dickerson, 310 U.S. 554 (1940) .. 8

United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973) 23

United States v. Sharpnack, 355 U.S. 286 (1958) 22

Statutes — Page

California Health and Safety Code, Sec. 24260 2
California Health and Safety Code, Sec. 24263 2
California Health and Safety Code, Sec. 24264 2
California Health and Safety Code, Sec. 24269 2
California Health and Safety Code, Sec. 39276 2
California Health and Safety Code, Sec. 39012 ..1, 2
Clean Air Act, Sec. 1 9
Clean Air Act, Sec. 7(b) 10
Clean Air Act, Sec. 101(a)(3) 27
Clean Air Act, Sec. 110 ....6, 7, 11, 13, 14, 21, 27
Clean Air Act, Sec. 110(a)(2)(c) 6, 18
Clean Air Act, Sec. 110(d) 7, 22
Clean Air Act, Sec. 111 .....11, 12, 21
Clean Air Act, Sec. 111(b) 11
Clean Air Act, Sec. 111(c)(1) 21
Clean Air Act, Sec. 112 .....12, 21
Clean Air Act, Sec. 112(d)(1) 21
Clean Air Act, Sec. 113(a)(1) 7, 22
Clean Air Act, Sec. 114 21
Clean Air Act, Sec. 114(b)(1) 21
Clean Air Act, Sec. 116 .....5, 15, 17, 18, 30
Clean Air Act, Sec. 118 .....3, 4, 5, 6, 7, 8, 9, 10
.....11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 23, 25
.....26 28, 29, 30, 32
Clean Air Act, Sec. 304 31
Federal Assimilative Crimes Act, 18 U.S.C. Sec. 13
..... 22
Federal Coal Mine Safety Act, 30 U.S.C. Sec. 478.. 22

Page

Federal Tort Claims Act, 28 U.S.C. Sec. 1346(b).. 22
Hot Oil Act, 15 U.S.C. Sec. 715 22
Noise Control Act of 1972 (42 U.S.C. § 4901)
..... 28
United States Code, Title 33, Sec. 1251(a) 27
United States Code, Title 33, Sec. 1323 28
United States Code, Title 33, Sec. 1342 24
United States Code, Title 33, Sec. 1342(1) 27
United States Code, Title 33, Sec. 1365 31
United States Code, Title 42, Sec. 1251(b) 27
United States Code, Title 42, Sec. 1857 27
United States Code, Title 42, Sec. 1857(a)(3) 27
United States Code,Title 42, Sec. 1857c-5 .....11, 27
United States Code, Title 42, Sec. 1857c-5(a)(2)
(B) 13
United States Code, Title 42, Sec. 1857c-5(a)(2)
(C) 6, 13, 14, 18
United States Code, Title 42, Sec. 1857c-5(a)(2)
(D) 14
United States Code, Title 42, Sec. 1857c-5(a)(2)
(F)(i) 14
United States Code, Title 42, Sec. 1857c-5(a)(2)
(F)(ii) 14
United States Code, Title 42, Sec. 1857c-5(d) 7, 22
United States Code, Title 42, Sec. 1857c-5(e) 19
United States Code, Title 42, Sec. 1857c-5(f) 19
United States Code, Title 42, Sec. 1857c-8(a)(1)
..... 22

Page

United States Code, Title 42, Sec. 1857d-1 15
United States Code, Title 42, Sec. 1857f .....
.....6, 7, 12, 13, 15, 28
United States Code, Title 42, Sec. 1957c-8(a)(1) .. 7
United States Code, Title 42, Sec. 4903(b) 28
United States Code, Title 42, Sec. 4905 28
United States Constitution, Art. VI, cl. 2 20
Water Pollution Control Act, Sec. 101(a) 27
Water Pollution Control Act, Sec. 101(a)(3) 27
Water Pollution Control Act, Sec. 101(b) 27
Water Pollution Control Act, Sec. 101(b)(1) 27
Water Pollution Control Act, Sec. 301(a) 27
Water Pollution Control Act, Sec. 313 .....3, 4, 18
.....28, 39, 30, 31, 32
Water Pollution Control Act, Sec. 402 .....24, 30
Water Pollution Control Act, Sec. 505 .....30, 31
Water Pollution Control Act, Sec. 505(f) 31
Water Pollution Control Act, Sec. 510 30

Miscellaneous

116 Congressional Record (1970), p. 19207 16
House-Senate Conference Committee Rep. No. 1783, 91st Cong. 2nd Sess.; U.S. Code Cong. & Admin. News (1970), p. 5381 17
Public Law 159; 69 Stat. 322 (July 14, 1955) ("1955 Act") 9
Public Law 88-365; 73 Stat. 646 (September 22, 1959) ("1959 Act") 9

Page

Public Law 88-206; 77 Stat. 392 (December 17, 1963) ("1963 Act") 10
Public Law 90-148; 81 Stat. 485 (November 21, 1967) ("1967 Act") 10
Public Law 91-604; 34 Stat. 1713 (December 31, 1970) ("Clean Air Act") 10
Senate Report No. 91-1196, 91st Congress 2d Sess. (1970), p. 23 11
Senate Report No. 91-1196, 91st Cong., 2nd Sess. (1970), p. 37 20

Textbooks

Bolbach, The Courts And The Clean Air Act, Environmental Reporter, Monograph No. 19 (July 12, 1974), p. 25 21
Comment, Local Control of Pollution from Federal Facilities, 11 San Diego Law Review (1974), pp. 972, 982-83 .....17, 31, 32
Comment, Local Control of Pollution From Federal Facilities, 11 San Diego Law Review (1974), pp. 972, 987 25
Luneburg, Federal-State Interaction Under The Clean Air Amendments of 1970, 14 Boston College Ind. & Com. L.R. (1973), pp. 637, 643-646 .....22, 24
United States Code Congressional and Administrative News (1970), p. 5360 16

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-220

COMMONWEALTH OF KENTUCKY, *ex rel.*
ED W. HANCOCK, Attorney General,

Petitioner,

vs.

RUSSELL E. TRAIN, Administrator, ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Brief of the California Attorney General, California Air Resources Board and Georgia Attorney General as Amici Curiae in Support of Petitioner.

Interest of Amicus Curiae, State of California.

The interest of the State of California in this litigation is to seek legal clarification and assurance that state and local air pollution control agencies have permit authority over the numerous stationary sources of air pollution operated by the federal government in California.

In California, the primary responsibility for the control of air pollution from stationary sources lies with local and regional air pollution control districts. Cali-

fornia Health and Safety Code Section 39012. These authorities have been granted broad powers by the Legislature to "make and enforce all needful orders, rules and regulations necessary or proper for the administration of the district . . ." and to reduce air pollution. Health and Safety Code Section 24260. Air pollution control districts have specific authority to require owners and operators of stationary air pollution sources to obtain permits from the district prior to the construction or operation of such sources. Health and Safety Code Sections 24263, 24264. A major function of the permit requirement in California air pollution control law is to insure that the air pollution control authorities are provided with "such information, analyses, plans or specifications as will disclose the nature, extent, quantity, or degree of air contaminants which are or may be discharged by such sources[s]." Health and Safety Code Section 24269. This data in turn facilitates the air poilution control agency's related authority to condition the issuance of permits to operate or construct air pollution sources, on the provision of specified control equipment or, in the case of new sources, on changes in the plans or specifications so that the districts can comply with their directive to achieve and maintain both state and federal ambient air quality standards. Health and Safety Code Sections 24264, 39276.

California is particularly concerned that the Clean Air Act not be interpreted in a way that would exempt the numerous federal sources of air pollution from local

and regional permit requirements. The Clean Air Act imposes legal obligations on the state and local governments to clean up air pollution from *all* stationary sources in order to achieve and maintain national standards. The permit requirement is the fundamental implementation and enforcement tool available to local and regional air pollution control districts for complying with the federal requirements. California is, therefore, interested in legal assurances that its local, regional and state air pollution control strategies are not impaired by exemptions given to federal stationary sources from local and regional permit requirements.

Section 118 of the Clean Air Act Amendments of 1970, under review in this case, is virtually identical to Section 313 of the Water Pollution Control Act Amendments of 1972. California is, therefore, also interested in legal clarification and assurances that its permit program for implementing and enforcing the Water Pollution Control Act Amendments of 1972 applies equally to the numerous federal sources of water pollution in California.

California has already participated as amicus curiae in this case before the Sixth Circuit Court of Appeals (*sub nomine Kentucky v. Ruckelshaus*, 497 F.2d 1172 (6th Cir. 1974)), and in the similar cases of *State of Alabama v. Seeber*, 502 F.2d 1538 (5th Cir. 1974) and *California v. Stastny*, No. 72-2905 (9th Cir., appeal docketed November 6, 1972). California is also the plaintiff in *California v. EPA*, ... F.2d ....; 7 E.R.C. 1667 (9th Cir. 1975) which held that federal agencies

and enclaves in California and Washington are subject to state water pollution control permit requirements under Section 313 of the Water Pollution Control Act Amendments of 1972.

California and Georgia are familiar with the legal questions presented and are vitally interested in asserting their position that federal stationary sources of air pollution are required under Section 118 of the Clean Air Act Amendments of 1970 to comply with state and local permit requirements.

Summary of Argument.

Successive amendments to the Clean Air Act since the initial legislation in 1955 show that Congress has progressively subjected operators of federal facilities to federal, state and local pollution control authority. Section 118 adopted in the 1970 amendments clearly shows that Congress intended to further strengthen federal, state and local pollution control authority to include permit requirements over federal facilities. Respondents, by introducing a spurious substance-procedure dichotomy in the statutory term "requirements", are arguing that federal facilities are exempt from even *federal* permit requirements.

The plain statutory wording of Section 118 supports the view that "requirements" includes permit requirements. To argue otherwise is to exempt non-federal facilities as well as federal facilities from permit requirements, a result clearly inconsistent with the Clean Air Act. Reference to other sections in the Clean Air Act,

such as Section 116, and to the legislative history, supports a broad interpretation of "requirements" to include permit requirements.

State and local pollution control permit requirements are necessary elements in state pollution control plans. If states are to fulfill their federally mandated pollution control duties, operators of federal facilities must be subject to state and local permit requirements.

Neither the Supremacy Clause nor the doctrine of sovereign immunity insulate federal facilities from state and local permit requirements. Section 118 of the Clean Air Act, in itself, constitutes a waiver of sovereign immunity. The fact that permit requirements are approved by EPA in state implementation plans, makes those permit requirements binding on federal facilities.

The strong structural and terminological similarities between the Clean Air Act and the Water Pollution Control Act, especially with respect to provisions for controlling federal facilities, provides additional support for construing the term "requirements" as used in both Acts to include permit requirements.

ARGUMENT.

INTRODUCTION.

The single issue in this case is whether Section 118 of the Clean Air Act Amendments of 1970 ("Clean Air Act") (42 U.S.C. § 1857f) requires operators of federal facilities to comply fully with federally approved state plans for implementation, maintenance and enforcement of national ambient air quality standards or whether that section requires only that they comply with the substantive standards and limitations of such plans but not their permit provisions. The resolution of this issue turns on the meaning of the phrase "requirements respecting control and abatement of air pollution" as it is used in Section 118.

Section 110 of the Clean Air Act requires the states to prepare and submit to the EPA Administrator a plan for implementing, maintaining and enforcing the national ambient air quality standards throughout the state.

Section 110 requires also the EPA Administrator to approve state implementation plans if he determines that the plans contain the content requirements specified including:

> ". . . provisions for establishment and operation of appropriate devices, *methods, systems,* and *procedures* necessary to monitor, compile, analyze data on ambient air quality. . . ." Section 110(a)(2)(c); 42 U.S.C. § 1857c-5(a)(2)(C). (Emphasis added.)

Once approved, a state implementation plan achieves the status of a federal regulation [*Albama v. Seeber,* 502 F.2d 1238 (5th Cir. 1974)] which the Administrator has the power to enforce. [*Id.*; Sections 110(d) and 113(a)(1), 42 U.S.C. § 1857c-5(d) and § 1857 c-8(a)(1)].

Section 118 under review in this case provides that operators of federal facilities

> ". . . shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

Congress provided also in Section 118 that when the paramount interest of the United States so requires, the President may exempt federal facilities from compliance with such requirements. When Sections 110 and 118 are read together, it is apparent that Congress intended operators of federal facilities to comply with federally approved state implementation plans, unless exempted by the President.[1] The Sixth Circuit, however, has imposed a gloss on Section 118 the effect of which is to exempt operators of federal facilities from permit systems, procedures and requirements contained in approved state implementation plans. *Kentucky v. Ruckelshaus,* 497 F.2d 1172 (6th Cir. 1974). To reach its decision, the Sixth Circuit had to conclude that the term "requirements" as it is used in Section 118 means only substantive requirements as distinguished from procedural requirements. The Sixth Circuit, relying on a "strained reading" of the legislative history of Section 118,[2] reasoned that Congress clearly waived exclusive jurisdiction over federal facilities with respect to compliance with substantive clean air standards, but intended no waiver with respect to procedural requirements.

---

[1]Clean Air Act Section 118; 42 U.S.C. § 1857f.

[2]*Alabama v. Seeber,* 502 F.2d 1238, 1246 (5th Cir. 1974).

Subsequently, the Fifth Circuit considered the same issue, rejected the reasoning of the Sixth Circuit as unpersuasive and held that operators of federal facilities must comply fully with state plans—including their permit or "procedural" provisions. *Alabama v. Seeber*, 502 F.2d 1238 (5th Cir. 1974). The Fifth Circuit relied on the scheme of the Act as a whole, the words of Section 118, and the Congressional purpose for enacting that section. The Fifth Circuit noted that the legislative history of Section 118 was somewhat ambiguous, and consequently declined to permit that history "to control the customary meaning of [the] words" of Section 118. *NLRB v. Plasterers Local Union No. 79*, 404 U.S. 116, 129 (1971); and *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

More recently, the Ninth Circuit in a substantially similar case,[3] has held that operators of federal facilities must comply fully with state "requirements respecting control and abatement of [water] pollution"—including state permit or "procedural" requirements. Recognizing "the strong structural similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments", the Ninth Circuit relied in part upon the reasoning of the Fifth Circuit in the *Seeber* case. In doing so, that Circuit implicitly rejected the reasoning if not the decision of the Sixth Circuit in the *Kentucky v. Ruckelshaus* case.

Amici Curiae concur with the Fifth and the Ninth Circuits. Clearly, by enacting Section 118, Congress to some extent intended to waive its exclusive legislative jurisdiction and require operators of federal facilities to

[3]*California v. EPA*, ... F.2d ....; 7 E.R.C. 1667 (9th Cir. 1975).

adhere to federally approved state implementation plans. Respondents do not dispute this. *Kentucky v. Ruckelshaus, supra,* at 1172; *Alabama v. Seeber, supra,* at 1246-47. Respondents dispute only the scope of this waiver. Accordingly, the issue is whether Congress intended to waive its exclusive jurisdiction with respect to "the enforcement mechanisms of federally approved state implementation plans." *Alabama v. Seeber, supra,* at 1247. Amici Curiae submit that the Clean Air Act's history and purpose, its general scheme and the words of Section 118 all show unequivocably that Congress intended that operators of federal facilities shall comply fully with federally approved state implementation plans, including the permit provisions of such plans.

I

Federal Facilities Must Comply With State and Local Permit Requirements for Controlling and Abating Air Pollution.

A. Successive Amendments to the Clean Air Act Show That Congress Has Increasingly Subjected Operators of Federal Facilities to Federal, State and Local Control Authority.

When Congress enacted the original version of the Clean Air Act in 1955,[4] it declared "the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution." (1955 Act, section 1.) Congress amended the Clean Air Act in 1959,[5]

[4]Public Law 159; 69 Stat. 322 (July 14, 1955) ("1955 Act").

[5]Public Law 88-365; 73 Stat. 646 (September 22, 1959) ("1959 Act").

1963,[6] 1967,[7] and 1970,[8] each time reiterating the policy that the United States should support and assist states and local governments to fulfill their primary responsibility to control and abate air pollution. Additionally, by each successive amendment Congress established a more comprehensive national system within which state and local governments might more effectively perform their functions. In this connection, the successive amendments manifest Congress' increasing realization and ultimately its determination that to assure air quality, states must have authority sufficient to regulate all sources of air pollution within their borders, including sources from federal enclaves.

As enacted in 1955, the Clean Air Act made no reference to federal facilities; however, in 1959, Congress added Section 118 to require operators of federal facilities to "cooperate" with state and local air pollution control agencies "to the extent practicable and consistent with the interests of the United States and with available appropriations . . ." (1959 Act, § 118.)

In 1963, another amendment authorized the HEW Secretary to require operators of federal facilities to obtain (revocable) permits from him before discharging certain pollutants into the air. (1963 Act § 7(b).) The 1963 Act also required operators of federal facilities to provide the HEW Secretary with plans, specifications and other information deemed by HEW to be relevant to the issuance of permits. *Id.* These same provisions were retained in the 1967 Act. (1967 Act, § 111.)

[6]Public Law 88-206; 77 Stat. 392 (December 17, 1963) ("1963 Act").

[7]Public Law 90-148; 81 Stat. 485 (November 21, 1967) ("1967 Act").

[8]Public Law 91-604; 34 Stat. 1713 (December 31, 1970) ("Clean Air Act").

By the Clean Air Act Amendments of 1970, Congress substantially strengthened the Act. For the first time, Congress required the States to develop plans to attain air quality standards within a specific period of time. (Clean Air Act § 110; 42 U.S.C. § 1857c-5.) At the same time, Congress enacted the current Section 118. The legislative history of Section 118 shows that Congressional displeasure with the performance of federal facilities under the voluntary compliance provisions of Section 111 of the 1967 Act prompted Congress to strengthen that section to require operators of federal facilities to comply with federal, state and local regulations. *Alabama v. Seeber, supra,* 1244-45; S. Rep. No. 91-1196, 91st Congress 2d Sess., at 23 (1970). The new "get tough" attitude manifested by Congress in the 1970 Amendments (both with respect to the states and federal facilities) provides every indication that by enacting Section 118, Congress fully intended operators of federal facilities to comply unqualifiedly with federally approved state implementation plans.

A comparison of Section 111 of the 1967 Act with Section 118 of the 1970 Act shows this to be the case. The 1967 Act, Section 111(b), provided that under certain circumstances, the HEW Secretary could require operators of federal facilities to obtain permits and to provide the Secretary with pertinent data with

respect to such permits. There is every reason to believe that in adopting the current Section 118, Congress intended the EPA Administrator (the successor to the HEW Secretary) to continue to have this permit authority over federal facilities. However, the Administrator has this authority pursuant to Section 118 only if the term "requirements" as it is used in Section 118 encompasses procedural as well as substantive requirements. This becomes apparent when it is considered that Section 118 explicitly requires federal facilities to comply with *federal* (as well as state and local) requirements. Respondents' construction of Section 118, that the term "requirements" only means *substantive* requirements, yields the anomalous result that EPA itself is powerless to impose permit requirements on federal facilities under its preemptive authority over standards of performance for new sources (§ 111) and hazardous emissions (§ 112), or otherwise. Respondents' interpretation of Section 118 in effect argues that Congress intended, in the 1970 Amendments, to *weaken* the control provisions over federal facilities. In light of Congress' clear intent to strengthen the provisions of the former Section 111 (1967 Act), such an interpretation clearly is untenable.

B. Permit Requirements Are "Requirements Respecting Control and Abatement of Air Pollution" With Which Federal Facilities Must Comply.

Section 118 of the Clean Air Act expressly requires:

> "Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge of air pollutants, *shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements* . . ." 42 U.S.C. 1857f. (Emphasis added.)

Respondents urge that the term "requirements," as used in the section, encompasses "substantive" but not procedural requirements and therefore the section does not direct operators of federal facilities to comply with federal or state permit procedures promulgated under Section 110 of the Act. Neither the scheme of the Act nor the words of Section 118 provide any support for Respondents' interpretation. In fact, Respondents have raised a "semantical red herring." *Alabama v. Seeber, supra,* 1245.

Initially it should be recalled that Kentucky's air pollution control permit system at issue here has been approved by EPA as a part of Kentucky's Implementation Plan, required to be prepared and adopted by Section 110 of the Clean Air Act.

Section 110 clearly contemplates the use of state and local permit systems or requirements, as it *requires* state implementation plans to contain specified components including the following:

> 1. "Emission limitations, schedules and timetables for compliance with such limitations, *and such other measures as may be necessary* to insure attainment and maintenance . . . [of the national standards] . . ." 42 U.S.C. 1857c-5(a)(2)(B). (Emphasis added.)
>
> 2. A ". . . provision for establishment and operation of appropriate devices, *methods, systems*

and *procedures* necessary to (1) monitor, compile and *analyze* data on ambient air quality . . ." 42 U.S.C. 1857c-5(a)(2)(C). (Emphasis added.)

3. A "procedure" for pre-construction review of the location of new sources. Such "procedure" must provide for adequate legal authority to prevent construction if the new source would prevent attaining or maintaining the national standards in the air basin. The "procedure" must also require the owner or operator of the proposed new source to submit to the state such information as may be necessary to determine if the new source would prevent attainment or maintenance of the national standards. 42 U.S.C. 1857c-5(a)(2)(D).

4. Legal authority adequate to carry out the implementation plan. 42 U.S.C. 1857c-5(a)(2)(F)(i).

5. "Requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources." 42 U.S.C. 1857c-5(a)(2)(f)(ii).

The use of the words like "methods", "systems" and "procedures" in Section 110 certainly supports the use of permit requirements by state and local air pollution control agencies. The question is whether the permit requirements apply to operators of federal facilities.

Implicit in Respondents' argument is the recognition that non-federal facilities must comply with federal. state and local permit requirements (as well as standards and limitations) in "applicable implementation plans."

Yet the plain wording of Section 118 requires that federal facilities ". . . shall comply with Federal, State,

interstate and local requirements respecting control and abatement of air pollution *to the same extent that any person is subject to such requirements.*" Section 118; 42 U.S.C. § 1857f. (Emphasis added.) Since "any person," for example a steel mill, is subject to both procedural and substantive state and local air pollution control requirements, it follows necessarily that operators of federal facilities, "to the same extent as any person," are subject to *all* requirements contained in "applicable implementation plans"—not just the so-called substantive requirements. To conclude otherwise compels that the term "requirements," as applied to "any person," be interpreted differently from the same term as applied to operators of federal facilities. This is contrary to common sense as well as to accepted rules of construction.

Reference to Section 116 of the Clean Air Act also supports our conclusion that "requirements" as used in Section 118 includes permit requirements.

It is readily apparent that Congress distinguished between 1) standards and limitations and 2) requirements respecting control and abatement of air pollution in Section 116 of the Clean Air Act:

> ". . . nothing in this chapter shall preclude or deny any state or political subdivision thereof to adopt or enforce (1) *any standard or limitation* respecting emissions of air pollutants *or* (2) any *requirement respecting control and abatement of air pollution* . . ." (Emphasis added.) 42 U.S.C. § 1857d-1.

The use of the term "requirement" clearly is intended to mean something other than "standard" or "limitation." Just as clearly, "requirement" is a much broader term than either "standard" or "limitation," and in-

cludes permit systems and other measures necessary for enforcement of state implementation plans.

Although it is not necessary to go behind the clear meaning of the phrase "state and local requirements respecting the control and abatement of air pollution," the legislative history of Section 118 in particular, and the Clean Air Act generally, only add force to our conclusion that federal facilities are required to comply with permit requirements.

When framing the language of Section 118, both the House and Senate were sensitive to the recalcitrance and inaction by federal air polluters in the clean-up effort. "Instead of exercising leadership in eliminating air pollution, the federal government has tended to be slow in this respect." H.R. No. 91-1146, 91st Cong., 2d Sess.; *U.S. Code Cong. & Admin. News*, 5360 (1970). During floor debate on the amendments, Rep. William Springer, ranking minority member of the House Committee on Interstate and Foreign Commerce again stated the problem:

> "One of the frustrating aspects of air pollution legislation is the presence of large federal installations either operated directly by the Government or under its direction which contaminate the atmosphere on a large scale. How can we expect cooperation or credibility for the governmental effort when the installations controlled by Uncle Sam are some of the worst polluters? The Federal Government as much as some private business has dragged its feet for purely economic reasons. *Allowing the Government to remain immune from the rules which we impose on others is wrong. . . .*" 116 Cong. Rec. 19207 (1970). (Remarks of Rep. Springer.) (Emphasis added.)

The very brief, almost passing, discussion of Section 118 in the House-Senate Conference Report suggests that there were no significant congressional differences of opinion over the broad obligations imposed on federal facilities by Section 118.

The House-Senate conference report on Section 118 states in summary form:

> "The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions."[9]

One commentator has concluded that the legislative history of Sections 116 and 118 is only a summary and should not be taken as conclusive of the meaning of these provisions.

> "Read together the two sections and their legislative history suggest that:
>
> "1. The legislative history, being only a summary of the proposed law, should not be read too narrowly and should not be taken as conclusive of the meaning of the provisions; and
>
> "2. The phrase 'requirements respecting control and abatement of air pollution' was not intended to encompass merely emission standards but rather the whole gamut of control measures including operating permits."[10]

---

[9]House-Senate Conference Committee Rep. No. 1783, 91st Cong. 2nd Sess.; *U.S. Code Cong. & Admin. News* 5381 (1970).

[10]Comment, *Local Control of Pollution from Federal Facilities*, 11 San Diego L. Rev. 972, 982-83 (1974); In *California v. E.P.A.*, ... F.2d ...., ...; 7 E.R.C. 1667, 1671 (9th Cir. 1975), the Ninth Circuit followed a similar analysis of the legis-

(This footnote is continued on next page)

Amici curiae submit therefore that the term "requirement," as used in Sections 118 and 116, should be interpreted as it is customarily used, to include matters of substance and procedure. Respondents' unordinary and strained interpretation should be rejected.

C. State and Local Permit Requirements Are Integral and Necessary Elements of Implementation Plans for Controlling Stationary Sources of Air Pollution, Including Federal Facilities.

Permit requirements have long been recognized as essential mechanisms for comprehensive implementation and enforcement of law. The Sixth Circuit's statement that "A permit has absolutely nothing to do with air quality" is patently erroneous.

The permit system, as Congress has recognized, is a *necessary* element of effective state implementation plans for controlling and abating air pollution. § 110 (a)(2)(C); 42 U.S.C. § 1857c-5(a)(2)(C).

Permit applications for authority to construct new sources provide essential data on the nature and volume of pollutants that the new source will emit. Permit applications also provide detailed information on the location and times when pollutants will be emitted. Permit applications also quickly disclose whether the new source will use the requisite or best available con-

lative history of section 313 of the Water Pollution Control Act, and concluded that the summary discussion of the term "requirements" in the committee reports should not be taken as dispositive of Congressional intent. The Ninth Circuit went on to hold that "requirements" in section 313 includes state *permit requirements* with which federal facilities must comply.

trol technology which are mandated by the Clean Air Act's strategy for controlling stationary sources. 42 U.S.C. § 1857c-5(e) and (f). If a proposed new source is not utilizing the requisite control technology, the permit requirement enables remedial action to be taken prior to construction thereby avoiding costly delays in enforcement or retro-fitting of the required technology. Permit requirements also facilitate monitoring of emissions by the air pollution control agency, and are an effective means for providing the agency with a comprehensive inventory of total emissions in the air basin. An up-to-date and comprehensive inventory of emissions in the air basin is essential to make decisions whether additional new sources should be allowed or whether variances should be granted without preventing achievement and maintenance of the national standards.

The burden on federal stationary sources imposed by state and local permit requirements is not substantial especially when it is conceded that the Clean Air Act *does* require federal facilities to comply with the timetable for achieving and maintaining the national standards. If federal facilities are exempted from permit requirements, however, there is no way to tell whether *all* the stationary sources in the air basin are reducing their emissions to achieve and maintain the national standards. Non-federal stationary sources, which do provide complete data through permit requests, thus may be put in the position of having to reduce their emissions more than is proportionately required to achieve and maintain the national standards. Propor-

tionate reduction and emissions from *all* stationary sources in an air basin cannot be effectively achieved if federal stationary sources are exempted from permit requirements.

Federal stationary sources often constitute a major contributor of pollution in a given air basin.[11] As a matter of practical necessity, therefore, the control strategy for the air basin must apply equally to federally operated and non-federal sources.

II

The Supremacy Clause and Sovereign Immunity Doctrine Do Not Insulate Federal Facilities From State and Local Permit Requirements.

A. The Supremacy Clause Is Inapplicable to Bar State Permit Requirements.

Section 118 unambiguously states that federal facilities "shall comply" with state "requirements respecting control and abatement of air pollution." Where Congress affirmatively declares that federal facilities or property is subject to state regulation, the Supremacy Clause (Art. VI, clause 2 of the United States Constitution) no longer insulates federal facilities from the specified kind of state regulation. *Mayo v. United States*, 319 U.S. 441, 446, 448 (1943).

Since it is our view that the term "requirements" in Sections 116 and 118 includes permit requrements, it necessarily follows that Section 118 meets the affirmative declaration test which this Court set out in *Mayo v. United States, supra,* at 448. The Supremacy Clause therefore cannot operate to prevent state and local air pollution control agencies from applying their permit

[11]S. Rep. No. 91-1196, 91st Cong., 2nd Sess. 37 (1970).

requirements to federal stationary sources of air pollution.

B. Federal Facilities Are Not Immune From State Suits Enforcing Section 118.

Amici curiae agree with the Fifth Circuit's succinct observation on the sovereign immunity argument in *Alabama v. Seeber, supra,* at 1248:

> "Little or no inference is required to conclude that section 118 embodies a waiver of sovereign immunity with respect to federal facilities."[12]

As we have previously pointed out, the Clean Air Act in Sections 111(c)(1), 112(d)(1) and 114(b)(1) specifically exempts certain federal facilities from state enforcement authority delegated by EPA pursuant to those sections. Section 110, which requires states to enforce "applicable implementation plans," however, contains no such exemptions for Federal facilities from state enforcement authority. If Congress had not intended to consent to suits against federal facilities over compliance with permit (or other) requirements it would have said so just as it did in Sections 111, 112 and 114. Both the plain wording in Section 118 and Section 110's failure to exempt federal facilities from state implementation plan requirements demonstrate that sovereign immunity from state enforcement of permit regulations has been waived.

[12]Additional authorities concluding that Congress has waived sovereign immunity in Section 118 are Bolbach, *The Courts And The Clean Air Act*, Environmental Reporter, Monograph No. 19, page 25 (July 12, 1974) and *County of Milwaukee v. Veterans Administration Center,* 357 F.Supp. 192 (E.D. Wis., 1973).

C. State and Local Permit Requirements in Approved State Implementation Plans Are Binding on the Federal Government; Federal Stationary Sources Must Comply With Such Permit Requirements.

As we have already indicated, emission reduction measures and other "requirements respecting control and abatement of air pollution" are the heart of implementation plans. Whether such regulations and requirements are adopted by the states and approved by EPA or, alternatively, promulgated by EPA when a state fails to submit an approvable plan or portion of a plan, these regulations and requirements constitute an "applicable implementation plan" and become federal law on approval. Sections 110(d) and 113(a)(1); 42 U.S.C. Sections 1857c-5(d) and 1857c-8(a)(1). *Appalachian Power Co. v. EPA*, 477 F.2d 495, 499 (10th Cir. 1973); *Alabama v. Seeber, supra,* 1248; Luneburg, *Federal-State Interaction Under The Clean Air Amendments of 1970,* 14 Boston Col. Ind. & Com. L.R. 637, 640 (1973).

Permit requirements, applicable to federal stationary sources as well as non-federal facilities, contained in approved state implementation plans thus achieve the status of federal law and are thereby binding on the federal government and federal stationary sources.

Congress clearly has the power to adopt as federal law the laws and regulations of a state. *United States v. Sharpnack*, 355 U.S. 286 (1958). Congressional legislation has often "borrowed" or adopted state laws and regulations in order to implement federal policies. *E.g.*, Federal Tort Claims Act, 28 U.S.C. section 1346(b); Federal Assimilative Crimes Act, 18 U.S.C. Section 13; Federal Coal Mine Safety Act, 30 U.S.C. Section 478; Hot Oil Act, 15 U.S.C. § 715.

Where there is federal adoption or "borrowing" of state law to implement or promote the purposes of a federal statutory scheme, state interpretations of "borrowed" state law have been held binding on the federal government in a number of cases. *Gauley Mountain Coal Co. v. Bureau of Mines,* 224 F.2d 887 (4th Cir. 1955); *RFC v. Beaver County,* 328 U.S. 204 (1946).

It is only where the state law or regulation (and the state interpretation) is inconsistent with the federal statutory scheme or policy or where the state law would violate the Constitution, that courts have not upheld state laws or have exempted federal enclaves from the application of state laws. *Air Terminal Services Inc. v. Rentzel,* 81 F.Supp. 611 (ED Va, 1949); *Smayda v. United States,* 352 F.2d 251 (9th Cir. 1965); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 595 (1973).

In this case, however, the state laws and regulations (permit requirements) clearly are consistent with the federal statutory scheme and policy of controlling and abating air pollution everywhere in the nation, including pollution emitted from federal enclaves. In placing major emphasis on state implementation plans, Congress clearly intended that state laws, regulations and requirements which implement the objectives of a control strategy and the purposes of the Clean Air Act apply equally to federal enclaves and facilities. The fact that Section 118 of the Clean Air Act specifically singles out federal facilities for equal treatment only adds weight to our view that state laws and regulations adopted as federal law by the federal government to implement congressional statutes are binding on federal enclaves and stationary sources of pollution.

Amici curiae submit that the proper test in reviewing the applicability of state laws and regulations affecting federal stationary sources contained in approved implementation plans is to determine 1) whether such state laws and regulations have been properly reviewed and approved by EPA, 2) whether such state laws and regulations aid in the attainment and maintenance of the national ambient air quality standards; and 3) whether upholding applicability of state laws and regulations to federal stationary sources or enclaves *would prevent* attainment and maintenance of the national air quality standards by the congressionally prescribed times, would frustrate the purposes of the Clean Air Act or would violate the Constitution.[13] Amici curiae submit that using this test, the application of Kentucky's permit requirements (approved by EPA) to federal enclaves and stationary sources of air pollution is clearly supportable.

D. Permit Requirements Do Not Constitute a Significant Additional Burden on Federal Facilities.

It is not contested that federal facilities must, at a minimum, comply with federal, state, interstate and local air pollution control *standards* and limitations. As we have previously argued, the permit requirement is essentially a means to insure compliance with the standards. This is particularly true in the case of the permit programs [National Pollutant Discharge Elimination System or NPDES] required to be implemented by Section 402 of The Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. Section 1342.

---

[13]See Luneburg, *Federal-State Interaction Under The Clean Air Amendments of 1970,* 14 Boston College Ind. & Com., L.R. 637, 643-46 (1973).

Therefore "[i]f a federal agency must comply with local substantive law and local permits must issue as long as such substantive law is obeyed, then the effect of the permit procedure solely is to enable the local government to determine if the agency is indeed obeying the law. In this sense the permit procedure imposes no additional burden on the federal agency since it is already legally obligated to do all those things which will entitle it to a permit." Comment, *Local Control of Pollution From Federal Facilities,* 11 San Diego L. Rev. 972, 987 (1974).

The fact that state and local permit requirements carry the power to stop the operation or construction of federal air pollution sources (by denyng or revoking permits), does not mean that a significant additional burden has been imposed on the federal facilities. The denial or revocation of a permit to operate or construct can only be exercised in order to achieve or maintain federal, state, interstate and local air quality standards which federal facilities are concededly required to obey. The only burden imposed on the federal facility is, therefore, the burden of seeking administrative or judicial relief from permit revocations or denials it believes are unnecessary to achieve and maintain state and national air quality standards.

In any event, it is quite apparent that Congress has not granted state and local governments total control over federal facilities through Section 118. Section 118 expressly gives the President authority to exempt individual federal facilities from federal, state and local "requirements."

For those reasons, amici curiae believe that Congress has affirmatively declared its intent to subject federal facilities to state and local permit requirements and has consented to enforcement actions.

III

The Complementary Nature of the Clean Air Act and the Water Pollution Control Act, and the Near Identity in Both Acts of Provisions Controlling Federal Facilities, Requires a Uniform Interpretation in Both Acts That the Term "Requirements" Encompass Permit Systems in Approved Pollution Control Plans.

Amici curiae submit that in this case, the "strong structural and terminological similarities between the Clean Air Act and the 1972 Water Pollution Control Act Amendments"[14] ("Water Act"), show that the Court should refer to the Water Act Amendments as an aid to interpreting Section 118 of the Clean Air Act. *Mattz v. Arnett*, 412 U.S. 481, 505, n. 25 (1973). In fact the issue raised by the case before this Court cannot be resolved definitively without considering the same issue arising under the Water Act.[15] Moreover, the provisions of the Water Act Amendments compel the conclusion that with respect to both Acts, Congress intended operators of federal facilities to comply fully with federal or state requirements respecting control and abatement of pollution including permit provisions of federally approved state plans. The two Acts manifest a parallel Congressional purpose, structure and design, and in pertinent parts, use the same language.

The Congressional purpose underlying each Act is substantially identical. In enacting the Water Act, Con-

[14]*California v. EPA*, ... F.2d ...., 7 E.R.C. 1667 (9th Cir. 1975).

[15]*Compare Alabama v. Seeber, supra,* to *California v. EPA, supra.*

gress declared that its objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." (§ 101(a); 33 U.S.C. § 1251(a).) Similarly, with respect to the Clean Air Act, Congress declared that its objective is "to protect and enhance the quality of the Nation's air resources . . ." (§ 101 (b)(1); 42 U.S.C. § 1857.)

The structure and design of the Acts also is substantially the same. In each Act, Congress recognized that state and local governments have the primary responsibility for preventing and controlling pollution. Section 101(b) of the Water Act declares in part that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states to prevent, reduce and eliminate pollution." (42 U.S.C. § 1251(b).) Section 101(a)(3) of the Clean Air Act declares "that the prevention and control of air pollution at its source is the primary responsibility of states and local governments." (42 U.S.C. § 1857(a)(3).) Also in each Act, Congress intended that the states should develop and with the Administrator's approval, administer clean air implementation plans (42 U.S.C. § 1857c-5) or water pollution control programs (33 U.S.C. § 1342(1) to assure compliance with air and water standards established by the respective Acts. And in each Act, Congress established timetables within which the states must achieve specified standards of water and air quality. Water Act, § 301 (a); Clean Air Act § 110.)

Finally, Congress used precisely the same words in each Act to insure that federal facilities would be bound to comply with *all* pollution control and abatement requirements in federally approved state implementation plans. Both Section 118 of the Clean Air Act and Section 313 of the Water Act require that operators of federal facilities:

> ". . . shall comply with Federal, State interstate and local requirements respecting control and abatement of [air] pollution to the same extent that any person is subject to such requirements . . ." 42 U.S. § 1857f; 33 U.S.C. § 1323.[16]

Additionally, Section 118 of the Clean Air Act and Section 313 of the Water Act both provide that ". . . [T]he

---

[16]The Noise Control Act of 1972 (42 U.S.C. § 4901 *et seq.*), while different in some respects from the Clean Air and Water Acts, contains language virtually identical to that in Section 118 of the Clean Air Act and Section 313 of the Water Act respecting compliance by federal facilities with state and local noise requirements. The Noise Control Act of 1972 provides that operators of federal facilities ". . . shall comply with Federal, State, interstate and local *requirements* respecting control and abatement of environmental noise to the same extent that any person is subject to such *requirements*". 42 U.S.C. § 4903(b) (emphasis added). In addition, the Noise Control Act of 1972 expressly allows state and local governments to ". . . establish and enforce controls on environmental noise (or one or more sources thereof) through the *licensing, regulation,* or restriction of the use, operation or movement of any product or combination of products" 42 U.S.C. § 4905 (emphasis added). This demonstrates that the use of the term "requirements" in the Noise Act includes "licensing" and permit systems or programs.

The near identity of the Noise Act's provision governing compliance by federal facilities with state and local "requirements", with the parallel provisions in the Clean Air and Water Acts, is further support for a uniform interpretation that intended federal facilities to comply with state and local permit requirements respecting the control and abatement of (1) air pollution, (2) water pollution and (3) noise pollution.

President may exempt any [effluent or emission] source of any department, agency, or instrumentality in the executive branch from compliance with any such requirements if he determines it to be in the paramount interest of the United States to do so. . . ."

Section 313 of the Water Pollution Control Act (like Section 118 of the Clean Air Act and for all the reasons set forth, *supra,* with respect to the Clean Air Act) requires operators of federal facilities to comply fully with state "programs" respecting control and abatement of pollution including state permit programs. Significantly, however, the Water Pollution Control Act, for one additional reason, more strongly manifests the intent of Congress that operators of federal facilities comply fully with state permit regulations.

Specifically, Section 313 provides that operators of federal facilities shall comply with federal and state "requirements . . . , including the payment of reasonable service charges." The phrase regarding service charges clearly refers to those service "charges incident to state permit programs." *California v. EPA,* .... F.2d ...., 7 E.R.C. 1667, 1671-1672 (9th Cir. 1975). No other meaning is possible, for as the Ninth Circuit pointed out in *California v. EPA, supra,* if the word "requirements" as it is used in Section 313 were interpreted to refer only to substantive effluent standards and limitations, then the phrase "including the payment of reasonable service charges" would be a *non sequitur.*[17]

---

[17]In *California v. EPA, supra,* 7 E.R.C. 1667, 1671, respondents counter this by contending that "reasonable service charges"

(This footnote is continued on next page)

There is another parallel between the Clean Air Act and the Water Pollution Control Act. Section 116 of the Clean Air Act, as we have argued, distinguishes between "standard or limitation respecting emissions of air pollutants" and "any requirement respecting control or abatement of pollution", by separating the two phrases with the disjunctive "or". Section 510 of the Water Pollution Control Act uses the identical structure and language in making the same distinction except that "discharges of pollutants" is substituted for "emissions of air pollutants." Clearly this shows that when Congress used the phrase "any requirement respecting control or abatement of pollution" in Sections 116 and 118 of the Clean Air Act and in Sections 313 and 510 of the Water Pollution Control Act, Congress intended "any requirement" to be broader than "standard or limitation," to include permit systems, programs or procedures.

The Water Pollution Control Act Amendments of 1972 make explicit references to permits and permit programs in Sections 402 and 505. In Section 402, the Water Pollution Control Act sets up the National Pollutant Discharge Elimination System or NPDES which expressly requires a permit program for assuring compliance with water quality standards. Section 505

refers to those for state and local sewage treatment hookups. However, such an interpretation would render the phrase superfluous for no one has ever suggested seriously, that "subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of the municipal sewer system costs." *California v. EPA, supra,* 7 E.R.C. 1667, 1671. On the other hand, reasonable service charges, incident to a permit program, might be deemed sufficiently in the nature of a tax to require Congressional consent to become "properly payable federal obligations." *California v. EPA, supra,* 7 E.R.C. 1667, 1672.

authorizes citizen suits to enforce the Water Pollution Control Act against any person including the United States. Section 505(f) defines "effluent standard or limitation" to mean, among other things:

> " . . . a *permit or condition* thereof issued under section 402 of this Act, which is in effect under this Act (*including a requirement applicable by reason of section 313 of this Act*)." 33 U.S.C. § 1365. (Emphasis added.)

Section 505(f) in itself strongly suggests that Section 313 of the Water Act, which mandates operators of federal facilities to comply with federal, state and local pollution control requirements, must be interpreted to include mandatory compliance with state and local permit programs.[18] At a minimum, the express federal consent to citizen suits to enforce *permit* requirements in Section 505 clearly negates the reasoning of the Sixth Circuit in *Kentucky v. Ruckelshaus,* which justified exemption of federal facilities from state suits to enforce air pollution control permit requirements on the ground that the Clean Air Act's citizen suit provision (Section 304) does not expressly authorize permit enforcement suits.[19] The fact that the Clean Air Act does not expressly refer to permit systems or programs does not mean that operators of federal facilities must comply with state water pollution permit requirements but not state air pollution permit requirements. It would be plainly irrational to attribute different meanings to the federal compliance provisions of the Clean Air and

[18]Comment, *Local Control of Pollution from Federal Facilities,* 11 San Diego L.R. 972, 992 (1974).

[19]*Kentucky v. Ruckelshaus,* 497 F.2d 1172, 1176 (6th Cir. 1974).

Water Pollution Control Acts when these provisions (§§ 118 and 313) contain identical wording.[20]

In summary, the remarkable similarity and near identity of certain parallel provisions of the Clean Air and Water Pollution Control Acts require that, at least the parallel provisions be uniformly interpreted. Section 118 of the Clean Air Act and Section 313 of the Water Pollution Control Act being parallel provisions and nearly identically worded, admit no other rational interpretation other than mandating operators of federal facilities to comply with *federal, state* and *local* air and water pollution control permit requirements.

Conclusion.

In view of the plain language used by Congress in Section 118, ordering operators of federal facilities to comply with federal, state and local air pollution control "requirements," it is surprising that so many federal facilities have resisted compliance with state and local permit requirements which are essential for the states to fulfill their responsibilities to enforce implementation plans required by the Clean Air Act. There is nothing in either the legislative history of Section 118 or in the statutory language which supports the so-called substance procedure distinction urged by Respondents. On the contrary, resort to familiar rules of statutory construction compels the conclusion that the term "requirements" used in context includes *permit* requirements. Parallel provisions in the Water Pollution Control Act of 1972 and the strong similarity between the two statutes help clarify our position that operators of

[20]Comment, *Local Control of Pollution from Federal Facilities,* 11 San Diego L.R. 972, 992 (1974).

federal facilities must comply with both water and air pollution control permit requirements.

If federal facilities are exempted from state and local permit requirements, local and state efforts to control and abate air and water pollution will be set back.

Dated: May 8, 1975.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

ROBERT H. O'BRIEN,
CARL BORONKAY,
Assistant Attorneys General,

NICHOLAS C. YOST,
RODERICK WALSTON,
DANIEL TAAFFE,
C. FOSTER KNIGHT,
Deputy Attorneys General,

C. FOSTER KNIGHT,
Deputy Attorney General,
Attorneys for Amicus Curiae
State of California.

ARTHUR K. BOLTON,
Attorney General of the
State of Georgia,

ROBERT E. HALL,
Assistant Attorney General,
Attorneys for Amicus Curiae
State of Georgia.

Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

WILLIAM J. BAXLEY
Attorney General of the
State of Alabama

HENRY H. CADDELL
Assistant Attorney General
Chief, Environmental Protection
Division

FREDERICK S. MIDDLETON III
Assistant Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

NATURE OF INTEREST

The State of Alabama has a unique interest in the outcome of this case which is not shared by other *amici* states, namely that Alabama has been litigating for over three years a separate action involving the same issues and the same primary defendant involved in the present case. A petition for a writ of certiorari in that action filed on behalf of TVA and other federal defendants is presently pending before this Court, and the Court's ruling in the present case will for all practical purposes be dispositive of the Alabama case. *(Seeber v. Alabama,* No. 74-851, Petition for Writ of Certiorari filed January 6, 1975.)

ARGUMENTS NOT ADEQUATELY PRESENTED

The State of Alabama recognizes that several *amici* briefs have been filed to date in support of the position of the Commonwealth of Kentucky. Nevertheless, not one of these briefs, including the original and reply briefs of the Commonwealth of Kentucky, have adequately represented the interests of the various states in the outcome of this litigation. The brief which Alabama submits herewith presents a thorough and concise analysis of the issues before this Court, and fills in many of the substantial gaps in the briefs already filed.

For example, Alabama's brief presents the only comprehensive analysis of Section 304 of the Act, 42 U.S.C. 1857 h-2, to date (pp. 25-30). A proper interpretation of this section is crucial to the outcome of this case, since, as discussed in the Alabama brief, respondents' argument that Section 118 of the Clean Air Act subjects federal facilities to only state emission standards and compliance schedules fails completely if Section 304 is not interpreted as they contend.

Nor have the briefs filed in support of Kentucky's position, or the Fifth Circuit's opinion in *Alabama v. Seeber*, 502 F.2d 1238 (5th Cir. 1974), sufficiently explained the reasons for the Act's disparate treatment of existing and new federal pollution sources, as does the Alabama brief. (pp. 21-25). In fact, all of the briefs written to date have overlooked the fact that Section 111 (d) of the Act, 42 U.S.C. 1857 c-6 (d), provides for state regulation of existing federal sources through the use of permits, whereas Section 111 (c)(1) specifically exempts new federal sources from state permit requirements.

The State of Alabama believes that it is essential for this Court to read its discussion of the legislative history of the Clean Air Amendments of 1970. (pp. 30-36). Although

this is the mainstay of respondents' argument, no one has offered an explanation as to why portions of the legislative history appear to be inconsistent with the plain language of the Act itself. Recognizing this inconsistency, the Fifth Circuit and the Commonwealth of Kentucky have simply dismissed the legislative history as sketchy and ambiguous; but the State of Alabama submits that the legislative history *is* consistent with the express language of the Act. A thorough and precise reading of the entire history of the Amendments (which apparently has not been done by any participant in this litigation to date) reveals that although respondents are correct in stating that both the original House and Senate versions of the Act *would have* subjected federal facilities to state emission standards and compliance schedules only, the Conference Committee specifically redrafted the Act to clarify that existing federal facilities must comply with *all* state pollution control requirements, including state permit requirements, carefully integrating specific changes into various sections of the Act—the exact *same* sections which the courts have consistently recognized as supporting Kentucky's position.

Finally, although the respondents' contention that special consideration should be given to the Environmental Protection Agency's interpretation of Section 118 requires little response, the State of Alabama believes that its discussion of this issue is the only complete and logical such discussion snubmitted thus far.

Alabama recognizes that its brief is late. Attorneys for the State of Alabama originally anticipated that the petition for certiorari in the *Seeber* case would be granted together with the granting of the petition in the present case. When the Court granted the petition herein on March 17, 1975, Alabama was not notified of this action, and only learned this

fact later upon inquiry to the Clerk of the Court concerning the status of its own case. Alabama then moved this Court to consolidate the Alabama case with the present case, but this motion was denied on October 14, 1975.

The original Alabama action in the *Sceber* case was commenced over three years ago, almost one month before Kentucky brought its own action. Through the years, the attorneys for the State of Alabama have acquired a thorough understanding of the Clean Air Act and the issues involved in the present case, and have demonstrated the ability to clearly present these issues to the Fifth Circuit. The *amicus* brief submitted on behalf of the State of Alabama represents a diligent effort on behalf of its attorneys to present the same issues to this Court in an even more thorough and concise manner, and Alabama therefore prays that the Court accept this brief, and avail itself of the thought and effort which has gone into it.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of the
State of Alabama

HENRY H. CADDELL
Assistant Attorney General
Chief, Environmental Protection
Division

FREDERICK S. MIDDLETON III
Assistant Attorney General

Supreme Court, U. S.
FILED
DEC 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF ALABAMA AS AMICUS CURIAE

WILLIAM J. BAXLEY
Attorney General of the
State of Alabama

HENRY H. CADDELL
Assistant Attorney General
Chief, Environmental Protection
Division

FREDERICK S. MIDDLETON III
Assistant Attorney General

INDEX

Page

Interest of Amicus Curiae 1

Summary of Argument 3

Introduction 11

Argument:

I. The plain language of the Act requires existing federal facilities to comply with state permit requirements 16

A. Section 118 requires federal facilities to comply with all requirements respecting control and abatement of air pollution, including state permit requirements 16

B. Section 116 affirms that requirements respecting control and abatement of air pollution are not limited to emission standards and compliance schedules 18

C. The Act distinguishes between state authority over new and existing federal pollution sources 21

D. Section 304 does not restrict state actions against federal facilities to actions for violations of emission standards and compliance schedules 25

Page

II. The legislative history of the Act confirms that existing federal facilities must comply with state permit requirements 30

III. Federal facilities must comply with state permit requirements if the purposes of the Act are to be accomplished 37

IV. The Environmental Protection Agency's interpretation of Section 118 is not entitled to special consideration 43

V. The Water Pollution Control Amendments of 1972 confirm that existing federal facilities must comply with state permit requirements under the Air Act 46

Conclusion 49

CITATIONS

CASES: Page

Alabama, State of v. Seeber, 502 F. 2d 1238, petition for a writ of certiorari pending, *sub nom. Seeber v. Alabama*, No. 74-851 ..... 2, 14, 38

Alabama, State of v. Tennessee Valley Authority, Civil Action No. 75-G2067 NE, U.S. District Court for the Northern District of Alabama, filed November 3, 1975 41

Kentucky v. Ruckelshaus, 497 F. 2d 1172 (6th Cir. 1974) 14, 39

McLaren v. Fleisher, 256 U.S. 477, 65 L.Ed. 1052, 41 S.Ct. 577 (1921) 44

Natural Resources Defense Council v. Environmental Protection Agency, 489 F.2d 390 (5th Cir. 1974) 43

Train v. Natural Resources Defense Council, —U.S.—, 95 S.Ct. 1470, 43 L.Ed. 2d 731 (April 16, 1975) 9, 12, 14, 43, 44, 45

Udall v. Tallman, 380 U.S. 1, 13 L.Ed 2d 616, 85 S.Ct. 792 (1965) 44

STATUTES AND REGULATIONS:

Clean Air Act, as amended in 1970, 84 Stat. 1676 *et seq.*, 42 U.S.C. 1857, *et. seq.*

Section 107 (a), 42 U.S.C. 1857 c-2 (a) 12

Section 109, 42 U.S.C. 1857 c-4 12

Section 110, 42 U.S.C. 1857 c-5 ..... 4, 12, 21

Section 110 (a)(1), 42 U.S.C. 1857 c-5 (a)(1) 13, 26

Section 110 (a)(2) 42 U.S.C. 1857 c-5 (a)(2) 13

Section 110 (a)(2) (A)(i), 42 U.S.C. 1857 c-5 (a)(2)(A)(i) 13

Section 110 (a)(2)(B), 42 U.S.C. 1857 c-5 (a)(2)(B) 13

Section 110 (a)(2)(F), 42 U.S.C. 1857 c-5 (a)(2)(F) 22, 26

Section 110 (a)(2)(F)(i), 42 U.S.C. 1857 c-5 (a)(2)(F)(i) 13

Section 110 (a)(2)(F) (ii) and (ii), 42 U.S.C. 1857 c-5, (a)(2)(F)(ii) and (ii) 13

Section 110 (a)(2)(F)(v), 42 U.S.C. 1857 c-5 (a)(2)(F)(v) 13

Section 110 (a)(3), 42 U.S.C. 1857 c-5(a)(3) 20

Section 110 (c), 42 U.S.C. 1857 c-5(c) 18

Section 110 (c)(2), 42 U.S.C. 1857 c-5(c)(2) 20

Section 110 (c)(3), 42 U.S.C. 1857 c-5 (c)(3) 20

Section 110 (e)(1)(A), 42 U.S.C. 1857 c-5 (e)(1)(A) 20

Section 111, 42 U.S.C. 1857 c-6 ..... 4, 16, 21

Section 111 (c)(1), 42 U.S.C. 1857 c-6(c)(1) 22, 23

Section 111 (d), 42 U.S.C. 1857 c-6(d) 22, 26

Section 111 (e), 42 U.S.C. 1857 c-6(e) 25

Section 112, 42 U.S.C. 1857 c-7 16

Section 112 (d)(1), 42 U.S.C. 1857 c-7(d)(1) 23

Section 113, 42 U.S.C. 1857 c-8 20

Section 113 (a)(3), 42 U.S.C. 1857 c-8(a)(3) 20

Section 114, 42 U.S.C. 1857 c-9 ..... 4, 16, 18, 21

Section 114 (b)(1), 42 U.S.C. 1857 c-9(b)(1) 5, 7, 21, 22, 26, 34

Section 115, 42 U.S.C. 1857 d 16

Section 116, 42 U.S.C. 1857 d-1 ..... 3, 7, 18, 19, 34, 47

Section 118, 42 U.S.C. 1857 f 3, 4, 5, 6, 7, 11, 17

Section 302 (e), 42 U.S.C. 1857 h(e) 16

Section 303, 42 U.S.C. 1857 h-1 ..... 16, 18

Section 304, 42 U.S.C. 1857 h-2 ..... 2, 5, 6, 15, 25, 30

Section 304 (a)(1), 42 U.S.C. 1857 h-2(a)(1) 25, 34

Section 304 (a)(2), 42 U.S.C. 1857 h-2(a)(2) 30

Section 304 (b), 42 U.S.C. 1857 h-2(b) 29

Section 304 (d), 42 U.S.C. 1857 h-2(d) 29

Section 304 (e), 42 U.S.C. 1857 h-2(e) 29

Section 304 (f), 42 U.S.C. 1857 h-2(f) 35

Clean Air Act, as amended in 1959, 73 Stat. 646 40

Clean Air Act, as amended in 1963, 77 Stat. 392 40

Air Quality Act of 1967, 81 Stat. 485 ..... 36, 40

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, *et seq.*, 33 U.S.C. (Supp. III) 1251, *et. seq.*:

Section 313, 33 U.S.C. (Supp. III) 1323 ..... 11, 47

Section 505 (f), 33 U.S.C. (Supp. III) 1365 (f) 48

Section 510, 33 U.S.C. (Supp. III) 1370 47

Kentucky Administrative Regulation AP-1 ..... 37, 38

MISCELLANEOUS:

H.R. 17255, 91st Cong., 2d Sess. (1970) 17

H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970) 34, 36, 40

H.R. Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970) 19, 33, 35

S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970) 33, 34, 36, 40

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL. ED W. HANCOCK, ATTORNEY GENERAL, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATE OF ALABAMA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

As required by Section 110 of the Clean Air Act, as amended in 1970, 42 U.S.C. 1857 et seq., the State of Alabama submitted to the Environmental Protection Agency a plan for the implementation, maintenance, and enforcement of national air quality standards within its geographic boundaries. This plan was approved by the Administrator of EPA on May 31, 1972.[1]

---

[1] 37 Fed. Reg. 10847-8.

Like the plan submitted by the Commonwealth of Kentucky and many other states, the Alabama plan incorporates an extensive permit system as its central operational mechanism. Consequently, the State of Alabama and the Commonwealth of Kentucky share the common interest of insuring that all pollution sources operating within their respective boundaries, including federal facilities, are required to comply with such EPA-approved state permit systems.

The State of Alabama also has an additional and unique interest in the outcome of this case in that it has been litigating for over three years a separate action involving the same issues and the same primary defendant, the Tennessee Valley Authority.[2] A petition for a writ of certiorari in this case filed on behalf of TVA and other federal defendants is presently pending before this Court, and the Court's ruling in the present case will for all practical purposes be dispositive of the Alabama case.[3]

Finally, the State of Alabama has an interest in the Court's interpretation of the citizen suits provision of the Act, Section 304, 42 U.S.C. 1857 h-2, which will necessarily be involved in the Court's resolution of the issues presented in the present case. This interpretation will strongly influence whether Alabama will seek to enforce its air pollu-

---

[2] This litigation was commenced on October 20, 1972, almost one month before the State of Kentucky filed the original action in the present lawsuit; **State of Alabama, et al., v. Lynn Seeber, General Manager of Tennessee Valley Authority, et al.,** United States District Court for the Northern District of Alabama, Civil Action No. 72-939.

[3] **Seeber v. Alabama,** No. 74-851; petition for writ of certiorari filed January 6, 1975.

On September 11, 1975, the State of Kentucky moved the Court to consolidate the Alabama case with the Kentucky case. This motion was denied on October 14, 1975.

tion laws against non-federal facilities in federal or state court.[4]

SUMMARY OF ARGUMENT

I.

The sole question for resolution in this case is whether or not Section 118 of the federal Clean Air Act, as amended in 1970, 42 U.S.C. 1857 f, requires federal facilities to comply with state permit requirements. Respondents argue that Section 118 requires federal facilities to comply only with applicable emission standards and compliance schedules, and not state permit requirements. The State of Alabama submits, however, that federal facilities must comply with *all* requirements respecting the control and abatement of air pollution, *especially* state permit requirements.

Alabama's interpretation first finds support in the plain language of the Act itself. Section 118 simply states that federal facilities shall comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." No distinction is made between emission standards and compliance schedules on the one hand, and all other requirements of federal, state, interstate, and local law on the other, as respondents suggest. In addition, the fact that federal facilities must comply with Section 118 requirements "to the same extent that any person is subject to such requirements" strongly indicates that Congress contemplated that federal facilities must comply with state permit requirements since it is not disputed that non-federal facilities must do so.

The express language of Section 116, 42 U.S.C. 1857 d-1,

---

[4] See page 28, below.

directly contradicts respondents' argument that the phrase "requirements respecting control and abatement of air pollution" is synonymous with "emission standards and compliance schedules." That section specifically refers to the same "requirements respecting control or abatement of air pollution" as Section 118, and distinquishes that comprehensive catagory of requirements from the sub-catagory of emission standards and limitations.

Alabama's interpretation gains further support in that Section 118 requires federal facilities to comply with *federal*, as well as state, interstate, and local requirements respecting the control and abatement of air pollution. If these requirements were restricted to emission standards and compliance schedules only, federal facilities would be exempt from the many important federal requirements of the Act as well as most requirements of state implementation plans. Respondents have failed to even suggest an explanation as to why Congress would have intended such a broad exemption for federal facilities.

A careful examination of Section 114, 111, and 110, 42 U.S.C. 1857 c-9, c-6, c-5, further reveals that Congress consistently provided that federal facilities are subject to all state requirements respecting the control and abatement of air pollution from existing sources, but are subject to no such state requirements with regard to new sources. Congress thus expressly recognized the absolute necessity of granting a state complete regulatory authority over existing sources, including federal facilities, as an integral part of its efforts to fulfill the requirements of its implementation plan and effectively achieve and maintain national air quality standards in the most efficient and equitable manner. Such regulatory authority is not necessary with regard to new sources, since there is no real regulatory task

for a state to accomplish. Emission standards for new sources are promulgated by the Administrator and are uniform throughout the country for comparable facilities. Similarly, all new sources are required to be in compliance before operation actually begins.

Respondents rely heavily upon the notion that Section 304 of the Act, 42 U.S.C. 1857 h-2, is the "sole mechanism" available to the states to remedy non-compliance by federal facilities with the requirements of Section 118, and that all such actions are limited by the provisions of that section to actions for violations of emission standards and compliance schedules only. But this argument directly contradicts Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), which grants a state the authority to enforce information gathering procedures against federal sources, since such procedures are certainly not "emission standards and compliance schedules."

More importantly, the primary mechanism available for state enforcement of Section 118 requirements is the enforcement authority established pursuant to state implementation plans, *not* Section 304 as respondents contend. In fact, Alabama submits that a state pollution control agency could not bring suit against a violator pursuant to Section 304 even if it wanted to, since access to that section is limited exclusively to individual citizens.

Respondents' argument that a state is a person for the purposes of suing a violator pursuant to Section 304 is nonsensical in view of the fact that that section provides that an action may not be commenced against an alleged violator unless the plaintiff has first given 60 days notice of the violation, both to the state in which the violation occurs and to the alleged violator. These notice requirements, together with the restriction of actions to violations of emission

standards and compliance schedules, strongly suggests that Section 204 was exclusively designed to provide a means whereby an individual citizen can trigger state enforcement action against a violator, and then assume the enforcement role if no such action is initiated.

II.

The legislative history of the Act confirms that existing federal facilities must comply with state permit requirements. In fact, a thorough reading of the history indicates that the Conference Committee, which drafted the final version of the Act which became law, specifically redrafted Section 118 to clarify that existing federal facilities must comply with all state pollution control requirements, and carefully integrated this change into other sections of the Act, the exact same sections discussed above which so clearly support a broad interpretation of the final version of Section 118.

The original House version of Section 118 simply required federal facilities to comply with "emission standards" where as the original Senate version required federal facilities to comply with the "requirements of this Act". The Senate provision went on to add that a governor, attorney general; or citizen could seek to enforce the provisions of Section 118 pursuant to Section 304. The State of Alabama tends to agree with respondents that both the original House and Senate versions of Section 118 would have subjected federal facilities to state requirements concerning emission standards and compliance schedules only. But contrary to respondents' suggestion, neither version actually became law.

The Conference Committee instead redrafted Section 118 to state that federal facilities shall comply with "requirements respecting control and abatement of air pollution to

the same extent that any person is subject to such requirements," a more comprehensive phrase, and then redrafted Section 116 of the Act, 42 U.S.C. 1857 d-1, as well, incorporating this same phrase and expressly indicating that it was not synonymous with "emission standards or limitations."

The Conference Committee also omitted the Senate reference in Section 118 to the enforcement of that section by a governor or attorney general through Section 304, making corresponding adjustments to the language of Section 304 to clarify that an individual *citizen* could still sue a federal facility pursuant to that section, but only for a violation of an emission standard or compliance schedule as discussed above. Similarly, the Conference Committee added Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), relating to state procedures for implementing and enforcing informational requirements, expressly distinguishing that new federal pollution sources would be exempt from state procedures, but that existing federal pollution sources would not.

Respondents' heavy reliance upon the brief Conference Committee comment on Section 118 is totally unfounded. It is obvious from its face that this simple comment is neither a comprehensive nor accurate analysis of the changes made in that section. The first paragraph merely summarizes the original House and Senate proposals without addressing the Conference Committee changes which were made, and the second paragraph, which does attempt to address these changes, is completely erroneous. The actual changes made by the Conference Committee in redrafting the Act, speak far stronger and more clearly than this comment in expressing the congressional intent in passing the Conference Committee's redrafted version of the Act..

III.

The State of Alabama submits that it is solely through the use of conditional permits that Kentucky, Alabama, and many other states are able to fulfill the requirements of their respective implementation plans and accomplish the fundamental purposes of the Act. If deprived of the use of these conditional permits, the success of a state's pollution control program depends exclusively upon the willingness of the polluter to voluntarily cooperate with the state pollution control agency during the three year pre-attainment period.

But voluntary cooperation is not what Congress had in mind when enacting the 1970 Amendments, nor has it proven to be a workable means of ensuring that federal facilities comply with emission and air quality standards on schedule. As one would have expected, "willingness" to cooperate has proven to be a poor substitute for mandatory requirements to do so. On May 31, 1975, only a few weeks before the mandatory attainment deadline in most states, the Environmental Protection Agency recognized that numerous federal facilities would not be in compliance by the deadline, and issued guidelines to determine the status of these facilities, and to establish "public commitments" to abate emissions "as expeditiously as practical." Alabama submits that EPA's efforts in this regard were simply too little too late, and that if the states had been allowed to subject these same federal facilities to the requirements of their respective permit systems three years ago, we would not have this problem before us today.

Alabama believes that regulating pollution sources through the use of conditional operating permits constitutes a fair and logical approach for expeditiously solving the many complex problems involved with retrofitting existing pollu-

tion sources. This mechanism allows for a rational exchange of ideas and trustworthy information between the polluting facility and the regulating agency, and also provides for extensive public participation through public hearings, all as an alternative to "voluntary cooperation" and its concomitant litigation.

IV.

Respondents contend that simply because the Environmental Protection Agency has stated its view that Section 118 does not require federal facilities to comply with state permit requirements, this view is entitled to special consideration by this Court. The State of Alabama does not agree.

The recent case of *Train v. Natural Resources Defense Council*, —U.S.—, 95 S.Ct. 1470, 43 L.Ed. 2d 731 (April 16, 1975) and the cases cited therein indicate that courts will defer to an administrative agency only where there has been a significant degree of detrimental reliance upon the agency's interpretation of the statute in question, and when the agency's interpretation is a "sufficiently reasonable" one. The State of Alabama contends that EPA's view of Section 118 cannot be considered reasonable in view of the plain language and legislative history of the Act to the contrary, and the total failure of voluntary cooperation as an alternative means of accomplishing the general goals and objectives of the Act.

More importantly, however, the federal facility respondents cannot be heard to argue that they have detrimentally relied upon EPA's "interpretation" of Section 118. Here, EPA did not promulgate any regulations concerning the interpretation of Section 118, much less as a part of their original implementation plan guidelines as was the case in

Train v. N.R.D.C. To the contrary, EPA expressly approved the implementation plan submitted by the Commonwealth of Kentucky which provided for an extensive permit system as the principal mechanism for achieving air quality standards in that state. In fact, Kentucky's permit system was apparently the type procedure "encouraged" by EPA, whereas state plans providing for attainment of national standards in three years without enforceable pre-attainment procedures to ensure compliance were looked upon with disfavor.

In addition, the only three examples in the record of an EPA interpretation of Section 118 occurred substantially after the dispute between Kentucky and the federal facility respondents had already ensued. Only later did EPA come to the rescue of these other federal agencies.

Nor can the federal facility respondents claim to be injured in any respect if they are now required by this Court to obtain a permit. To the contrary, it is the states and their respective citizens who are presently suffering the consequences of respondents' decision to contest Kentucky's efforts to properly regulate them.

V.

Finally, the State of Alabama submits that its interpretation of Section 118 gains additional support from the plain language of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. (Supp. III), 1251, et seq. The FWPCA Amendments established a nationwide scheme to control water pollution analagous to the scheme previously established by the Clean Air Amendments of 1970. Both Acts placed the primary responsibility for pollution control in the states and provided for state plans, promulgated pur-

suant to specific guidelines and subject to EPA approval, as the primary mechanism for fulfilling this responsibility.

Section 313 of the FWPCA Amendments, 33 U.S.C. (Supp. III) 1323, is derived from, and is virtually identical to, Section 118 of the Clean Air Act, and there is no reason to believe that Congress intended the phrase "requirements respecting control and abatement of [air] pollution" to have significantly different meanings in context of these closely related Acts. The FWPCA Amendments share with the Clean Air Act many of the provisions relied upon by the State of Alabama in its argument, but more importantly, each of the Acts have strong independent provisions which, when read in conjunction with one another, provide support for the proposition that federal facilities are subject to state permit requirements under both Acts.

INTRODUCTION

This case presents a question of statutory construction involving the first sentence of Section 118 of the Clean Air Act, as amended in 1970, (the "Act"), 42 U.S.C. 1857 f, which provides that:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, *shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.*" (Emphasis added).

Section 118 is an essential part of the comprehensive 1970 Amendments to the Act which created a new Federal-State scheme to achieve and maintain clean air throughout the country. Pursuant to this scheme the Administrator of the Environmental Protection Agency is required to promulgate, for certain known air pollutants, national air quality standards deemed necessary to protect the public health and welfare, Section 109, 42 U.S.C. 1857 c-4, and the respective states are required to achieve and maintain these air quality standards within their own boundaries. Section 107 (a), 42 U.S.C. 1857 c-2 (a).[5] The enactment of Section 118 was therefore necessary to insure that federal as well as non-federal pollution sources would be subject to pollution control requirements promulgated by the states to fulfill their responsibilities under the Act.

The principal mechanism through which each state is to operate to achieve and maintain air quality standards, and the heart of the scheme established by the 1970 Amendments, is the implementation plan procedure of Section 110. 42 U.S.C. 1857 c-5.[6] Pursuant to that section, each state is required to submit to the Administrator for approval a plan providing for the "implementation, maintenance, and enforcement" of air quality standards within such state.[7] Approval of a plan is conditioned upon, among other things, the following: reasonable notice and hearing must have been provided with regard to the plan submitted;[8] the plan must provide for the attainment of primary ambient air quality standards as expeditiously as practicable but no later than three years from the date of approval of the plan;[9] the plan must include emission limitations, schedules for compliance with such limitations, and other measures necessary to insure attainment and maintenance of the national air quality standards;[10] the plan must provide necessary assurances that the state will have adequate personnel, funding, and authority to carry out the plan;[11] the plan must contain requirements for the monitoring and reporting of emissions by polluting facilities; [12] and, the plan must provide for state authority to act in cases of emergencies which present an eminent and substantial danger to the public health.[13]

The Commonwealth of Kentucky, as required by Section 110, submitted an implementation plan which satisfied each of the above conditions, and the plan was subsequently approved by the Administrator.[14] Like the plans of many

---

[5] Section 107 (a) states as follows:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

[6] For a discussion of the 1970 Amendments and the states' responsibility with regard to achieving and maintaining national air quality standards, see **Train v. Natural Resources Defense Council,** ____U.S.____, 95 S.Ct. 1470, 43 L.Ed. 2d 731, 737-739 (April 16,1975).

[7] Section 110 (a)(1), 42 U.S.C. 1857 c-5 (a)(1)

[8] Section 110 (a)(2) 42 U.S.C. 1857 c-5 (a)(2).

[9] Section 110 (a)(2), (A)(i), 42 U.S.C. 1857 c-5 (a)(2)(A)(i).

[10] Section 110 (a)(2), (B), 42 U.S.C. 1857 c-5 (a)(2)(B).

[11] Section 110 (a)(2)(F)(i), 42 U.S.C. 1857 c-5 (a)(2)(F)(i).

[12] Section 110 (a)(2)(F)(ii) and (iii), 42 U.S.C. 1857 c-5 (a)(2)(F)(ii) and (iii).

[13] Section 110 (a)(2)(F)(v), 42 U.S.C. 1857 c-5 (a)(2)(F)(v).

[14] Kentucky's implementation plan was originally approved on May 31, 1972. 37 Fed. Reg. 10842.

other states, Alabama included, the Kentucky plan opted for a permit system as the central mechanism for fulfilling the implementation plan conditions and insuring the attainment and maintenance of national air quality standards.[15] These states consequently share a strong interest in insuring that *all* pollution sources, including federal facilities, be subject to the requirements of their respective permit systems.

The sole question for resolution in this case is whether or not Section 118 requires federal facilities to comply with such state permit requirements. The State of Alabama submits that it must and does so require. Respondents argue, however, that Section 118 contemplates a degree of voluntary cooperation and requires federal facilities to comply only with emission standards and compliance schedules, and not state permit requirements. (Resp. Brief, pp. 18-19)[16]

---

[15] Such a permit system was apparently one of two approaches encouraged by EPA. See page 45, below, and **Train v. N.R.D.C.**, above, 43 L.Ed. 2d, at 739-740.

A description of the Kentucky permit system, and the manner in which it operates to achieve national air quality standards, is discussed below, pp. 37-39.

[16] Interestingly, respondents strongly emphasized in the court below a distinction between "substantive" and "procedural" requirements of the Act. Requirements in the Kentucky implementation plan relating to permits, it was argued, were procedural in nature, and could not be enforced against federal facilities. [See **Kentucky v. Ruckelshaus**, 497 F.2d 1172, 1175 (6th Cir. 1974); (App. 162)]

The 6th Circuit adopted the distinction urged by respondents. However, in the subsequent 5th Circuit case of **Alabama v. Seeber**, 502 F.2d 1238, 1245 (1974), the Court rejected this substantive-procedure recharacterization of the statutory scheme as "a semantical red herring" drawing "no sustenance from the Act itself" Apparently recognizing the weakness of the substance-procedure distinction, the Solicitor General has subtly but most notably, abandoned reference to these terms in the brief filed on behalf of respondents with this Court.

Respondents' efforts to limit the scope of Section 118 depend primarily upon their reading of the legislative history of that section, and their interpretation of Section 304 of the Act, 42 U.S.C. 1857 h-2.[17] Respondents also contend that the EPA interpretation of Section 118 is entitled to special consideration.[18]

The State of Alabama submits, however, that the plain language of Sections 118, 304, and other provisions of the Act clearly indicates that federal facilities must comply with state requirements other than simply emission standards and compliance schedules — *especially* state permit requirements — and that a thorough reading of the legislative history of these provisions demonstrates that the language used therein was specifically redrafted by the Conference Committee to clarify this point. The same conclusion is reached when the Clean Air Act is compared with the 1972 Water Pollution Control Act Amendments which contain virtually identical language relating to state control over federal facilities. Indeed, considering the essential nature of a state's permit system in its efforts to achieve air-quality standards, and the inadequacy of the voluntary approach suggested by respondents, it is apparent that Congress *must* have intended that federal facilities submit to state permits requirements.

Finally, Alabama submits that EPA's interpretation

---

[17] Resp. Brief, pp. 24-31.

[18] Resp. Brief, pp. 31-34.

Respondents have apparently abandoned, along with their substance-procedure distinction, their Sovereign Immunity and Supremacy Clause arguments put forward in the Fifth and Sixth Circuits below.

of Section 118 is not entitled to special consideration, since that agency did not express its view on this matter until well *after* a dispute arose between the Kentucky Air Pollution Control Commission and the various federal facilities located in that state, and neither the various states nor the federal facilities could possibly have relied to their detriment on the EPA interpretation.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ACT REQUIRES EXISTING FEDERAL FACILITIES TO COMPLY WITH STATE PERMIT REQUIREMENTS.

A. Section 118 requires federal facilities to comply with all requirements respecting control and abatement of air pollution, including state permit requirements.

The State of Alabama submits that the clear and unambiguous first sentence of Section 118 means exactly what it says, federal facilities "shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." This encompasses all requirements of a state implementation plan approved by EPA — including the permit requirements of a state plan — as well as other requirements of state and local law not part of a state plan, and those requirements set out in various other sections of the Act.[19]

---

[19] See, for example, Section 111, 42 U.S.C. 1857 c-6; Section 112, 42 U.S.C. 1857 c-7; Section 114, 42 U.S.C. 1857 c-9; Section 115, 42 U.S.C. 1857 d; and Section 303, 42 U.S.C. 1857 h-1.

The broad and comprehensive language of Section 118 provides no support whatever for respondents' distinction between emission standards and compliance schedules, and all other requirements of federal, state, interstate, and local law. In fact, the original bill which passed the House of Representatives required federal facilities to "comply with Federal, State, interstate, and local emission standards. . . .", but this language was expressly changed in the final version which became law.[20]

A broad interpretation of Section 118 is supported by the fact that federal facilities must comply with these requirements "to the same extent that any person is subject to such requirements." Since it is not disputed that *non*-federal facilities must comply with all requirements respecting control and abatement of air pollution, including state permit requirements, it therefore follows that a federal facility, which must comply with these requirements to the same extent as non-federal facilities, must comply with state permit requirements as well.[21]

---

[20] H.R. 17255, 91st Cong. 2d Sess. (1970); Section 110 amending Section 111 of the Clean Air Act of 1963.

For a complete discussion of the legislative history of Section 118, see pages 30-36, below.

[21] It should also be noted that Section 118 applies to federal facilities or activities "resulting, **or which may result,** in the discharge of air pollutants". (Emphasis added).

This language is inconsistent with respondents' interpretation of Section 118. The "requirements" with which federal facilities must comply cannot be limited strictly to emission standards and compliance schedules since those requirements are meaningless with respect to a facility which is not in fact polluting. It must be concluded, therefore, that potential federal pollution sources are to be regulated before the fact, by the use of a mechanism such as a permit system, in order to prevent future violations.

Such an interpretation gains further support from the fact that Section 118 specifically requires federal facilities to comply with *federal*, as well as state, interstate, and local, requirements respecting control and abatement of air pollution. If these requirements are restricted to emission standards and compliance schedules only, federal facilities would not only be exempt from most requirements of state implementation plans, but in addition would be exempt from the requirements of Section 114, 42 U.S.C. 1857 c-9, regarding right of entry and inspection, monitoring, sampling, reporting, and record keeping; the federal emergency powers requirements of Section 303, 42 U.S.C. 1857 h-1; the requirements of implementation plans promulgated by EPA pursuant to Section 110 (c), 42 U.S.C. 1857 c-5 (c), and any other federal requirements set out in the Act. Respondents have failed to even suggest an explanation as to why Congress would have intended to exempt federal facilities from supervision by another federal agency. Indeed, as discussed below, such an interpretation would be contrary to the express congressional purpose in providing for stricter control of federal facilities through the 1970 Amendments.[22]

B. Section 116 affirms that requirements respecting control and abatement of air pollution are not limited to emission standards and compliance schedules.

The express language of Section 116, 42 U.S.C. 1857 d-1, directly contradicts respondents' contention that the phrase "requirements respecting control and abatement of air pollution" as used in Section 118 should be interpreted to mean only emission standards and compliance schedules. That section states in relevant part as follows:

> ". . . [N]othing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce *(1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution;* except that if an emission standard or limitation is in effect under an applicable implementation plan or under Section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section." (Emphasis added).

It is obvious from the language of Section 116 that Congress did not equate "requirements respecting control or abatement of air pollution" with "emission standards or limitations" as respondents would have us believe, especially in view of the fact that Section 116 was drafted by the Conference Committee — the *same* committee which expressly rejected the House language restricting federal compliance to emission standards and substituted in lieu thereof the broader duty of complying with all state requirements respecting control and abatement of air pollution. It is most unlikely that the Conference Committee, after specifically dealing with these two phrases, would have used them inconsistently in these closely related sections of the Act.[23]

---

[22] See page 39, below.

[23] See H. R. Rep. No. 91-1783, 91st Cong. 2d Sess. 48 (1970).

For a complete discussion of the legislative history of the Act as it specifically relates to the changes which the Conference Committee made in Sections 118, 116, and other sections of the Act, see pages 33-35, below.

Respondents' attempt to avoid the impact of Section 116 by arguing that the phrase "any standard or limitation respecting emissions of air pollutants" and the phrase "any requirement respecting control or abatement of air pollution" are mutually exclusive fails rather badly. (Resp. Brief, 20-21). The logical reading of Section 116 is that a "standard or limitation respecting emissions of air pollutants" is a subcategory of the broader class of "requirement[s] respecting control or abatement of air pollution", *not* an entirely separate class in itself.[24]

Respondents' efforts to gain support for their interpretation of Section 118 through other portions of the Act are equally without merit. (Resp. Brief, p. 21). Although it is possible that Section 110 (e)(1)(A), 42 U.S.C. 1857 c-5 (e)(1)(A), refers primarily to only those requirements regarding emission standards as respondents suggest, the word "requirements" as used in other portions of Section 110 [e.g., Section 110 (a)(3), 42 U.S.C. 1857 c-5 (a)(3); Section 110 (c)(2), 42 U.S.C. 1857 c-5 (c)(2); and Section 110 (c)(3), 42 U.S.C. 1857 c-5 (c)(3)], obviously refers to the entire range of implementation plan requirements incorporated in the Kentucky permit system, including monitoring, reporting and record keeping, emergency episode plans, inspections, and other measures necessary to insure attainment and maintenance of air quality standards.[25]

---

[24] Even if Section 116 is interpreted as respondents suggest, such an interpretation directly contradicts their principal argument that "requirement respecting control or abatement of air pollution" is synonymous with "emission standards and compliance schedules."

[25] Note also the reference in Section 113 (a)(3), 42 U.S.C. 1857 c-8 (a)(3), to the "requirements" of Section 114.

C. The Act distinguishes between state authority over new and existing federal pollution sources.

A careful examination of Sections 114, 111, and 110 of the Act[26] reveals that Congress carefully and consistently distinquished between state authority over new federal pollution sources, and state authority over existing federal pollution sources. Federal facilities are subject to *all* state requirements respecting the control and abatement of air pollution from *existing* sources, but are subject to *no* such state requirements with regard to *new* sources.

Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), for example, which deals with record keeping, reporting, monitoring, sampling, and the right of entry and inspection, provides as follows:

> "Each State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section (except with respect to *new* sources owned or operated by the United States)." (Emphasis added).

By specifically authorizing a state to develop a procedure for carrying out this section with respect to all sources except *new* sources owned or operated by the United States, it is apparent that a state *does* have such authority with respect to *existing* federal sources.

---

[26] 42 U.S.C. 1857 c-9, c-6, and c-5.

The State of Alabama submits that the "procedure for carrying out" section 114 which has been developed and submitted by the State of Kentucky is, in fact, *the permit procedure which is the subject matter of the present lawsuit.*[27] But whether or not the Administrator has technically "delegated" his authority to the State of Kentucky pursuant to Section 114 (b)(1) by approving the Kentucky implementation plan, it is apparent that the Kentucky permit system satisfies the conditions of Section 114 (b)(1), and it is equally apparent that Section 114 (b)(1) subjects existing federal pollution sources to "requirements" other than emission standards and compliance schedules.

The disparate treatment accorded new and existing federal sources is also exhibited in Sections 111 and 110 of the Act. 42 U.S.C. 1857 c-6 and c-5. Section 111 (c)(1) expressly exempts new sources owned or operated by the United States from state procedures for implementing and enforcing standards of performance for new sources promulgated by the Administrator. However, Section 111 (d), which provides for state "implementation plans" to establish, implement, and enforce standards for *existing* sources for which air quality criteria have not been issued, does *not* exempt federal facilities from the requirements of such plans. This is, of course, consistent with the fact that Section 110, which concerns implementation plans for the control of existing pollution sources for which air quality criteria have been issued, and upon which Section 111 (d) is modeled, simi-

---

[27] Note that the informational requirements of Section 114 are virtually identical to the implementation plan requirements of Section 110 (a)(2)(F), 42 U.S.C. 1857 c-5(a)(2)(F), which are carried out via the Kentucky permit system submitted to and approved by EPA. See page 38, below.

larly does not exempt federal facilities from its requirements. Obviously, when Congress intended to exempt a federal facility from a particular requirement in the Act, it clearly and expressly set out the exemption.[28] In the absence of any such exemption, federal facilities are subject to all the requirements of the Act to the same extent as any other person.

Respondents argue that the express exemptions of Section 111 (c)(1) and Section 112 (d)(1) are consistent with their interpretation of Section 118 that federal facilities are required to comply with state emission standards and compliance schedules only, and that these express exemptions for new federal sources should be carried over and applied *sub silentio* to existing federal sources. (Resp. Brief, 23-24) But this contention is patently incorrect since Sections 111 and 112 both specifically prohibit a state from *enforcing* emission standards against new federal sources as well as developing procedures to implement these standards. If existing federal sources were exempted in the same manner as new federal sources, Section 118 would be rendered meaningless since there would be no state requirements with which federal facilities would be required to comply.

By granting the states more authority over existing federal pollution sources than new federal sources, Congress recognized the different nature of control required for each class of facility. In dealing with existing sources, of course, the first task is to determine the general quality of the air in the relevant geographic region and then compute the respective amounts of pollution attributable to the emissions

---

[28] See also Section 112 (d)(1), 42 U.S.C. 1857 c-7 (d)(1), regarding hazardous air pollutants.

of each individual facility therein. Next, appropriate emission standards necessary to clean the air must be assigned to the various polluting facilities, and compliance schedules, emergency procedures, and operating time requirements must be established for each individual facility to insure that the public health and welfare is not endangered during the period preceding final attainment of the relevant emission and air quality standards. In conjunction with these efforts data must be generated with regard to the nature of each individual facility's operation, the type and amount of its emissions, and the actions which it has taken towards achieving final compliance.

For this formidable task to be conducted properly each existing pollution source must necessarily be regulated as an integral part of the control effort throughout the entire geographic region, and it is therefore imperative that the states, who have the responsibility under the Act for this control effort, be granted complete authority over all existing sources, including federal facilities, to insure that the public health and welfare is protected in the most efficient and equitable manner.[29]

Controlling new sources is not so complex. Emission standards are promulgated by the Administrator and are uniform throughout the country for comparable facilities. Consequently, there is no real need for a comprehensive and flexible regulatory mechanism to evaluate and control each individual facility as part of a coordinated clean-up effort, nor

[29] This is especially true considering the fact that federal facilities, such as respondent TVA, are often the largest polluters in a given air quality control region.

is there any compelling need for access to information concerning a particular facility's emissions or mode of operation. Similarly, since all new sources are required to be in compliance before operation begins,[30] there is no need for compliance schedules to be developed or for preattainment operating time or emergency procedures to be established.

D. Section 304 does not restrict state actions against federal facilities to actions for violations of emission standards and compliance schedules.

Crucial to respondents' attempt to limit the coverage of Section 118 to emission standards and compliance schedules is their interpretation of Section 304 of the Act, 42 U.S.C. 1857 h-2. Respondents contend, as did the 6th Circuit before them, that Section 304 is the "sole mechanism" available to the States to remedy non-compliance by federal facilities with the requirements of Section 118, and pursuant to Section 304 (a)(1), 42 U.S.C. 1857 h-2 (a)(1), all such state actions are limited to violations of emission standards and compliance schedules.[31] Since Section 304 (a)(1) is the only section in the entire Act which treats emission standards and compliance schedules as a category separate and apart from all other requirements respecting control and abatement of air pollution, in the absence of this connecting link between Section 118 and Section 304, respondents' argument in this case fails completely.

Respondents' interpretation of Section 304 is manifestly incorrect. In the first place, to argue that Section 304 limits state actions against federal facilities to violations of emis-

[30] See Section 111 (e), 42 U.S.C. 1857 c-6 (e).

[31] See respondents' brief, pages 25-27; and **Kentucky v. Ruckelshaus**, 497 F.2d 1172, 1177 (6th Cir. 1974); (App. 168).

sion standards and compliance schedules directly contradicts Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), which grants a state the authority to enforce information gathering procedures against existing federal sources, since record keeping, reporting, monitoring, sampling, and the right of entry and inspection are certainly not "emission standards or limitations" as defined in Section 304 (f), 42 U.S.C. 1857 h-2 (f).

More importantly, Section 304 cannot be considered as the "sole mechanism" available for state enforcement of Section 118 requirements since the primary means of state enforcement against all facilities, federal as well as state, is through the enforcement authority established pursuart to the requirements of EPA approved state implementation plans.[32] Contrary to respondents' suggestion (Resp. Brief, p. 25 fn. 30), this authority is not restricted in any manner to actions in state court against non-federal facilities. A state action for a pollution violation may be brought against a federal defendant in any proper court, state or federal, pursuant to a valid jurisdictional grant. Indeed, a case in point is the *Seeber* case, above, in which the original complaint filed in the U. S. District Court specifically alleged federal question jurisdiction and was brought pursuant to the enforcement provisions of the Alabama Air Pollution

---

[32] Section 110 (a)(1) and (a)(2)(F), 42 U.S.C. 1857 c-5 (a)(1) and (a)(2)(F); Section 111 (d)(1), 42 U.S.C. 1857 c-6 (d)(1).

The original House version of the Act, which expressly limited state control of federal facilities to emission standards, did not even have a citizen suits provision, and the Senate version, which provided that a governor or attorney general may enforce Section 118 requirements pursuant to Section 304, was expressly omitted from the final Act. A complete discussion of the legislative history of these sections appears at pages 30-35, below.

Control Act as incorporated in Alabama's implementation plan and approved by EPA.[33]

Moreover, it is the position of the State of Alabama that a state pollution control agency *could not* bring suit pursuant to Section 304 even if it wanted to since access to that section is limited exclusively to individual citizens. Although it is true that the term "person" is defined in the general definitional section of the Act, Section 302 (e), 42 U.S.C. 1857 h(e), to include a state, that general definition should logically be interpreted in context of Section 304

---

[33] **State of Alabama, et al., v. Seeber, et al.,** United States District Court for the Northern District of Alabama, Civil Action No. 72-939, Paragraphs 1 and 2.

With all due respect, the State of Alabama submits that the misinterpretation of Section 304 reflected in the opinion of the 6th Circuit in **Kentucky v. Ruckelshaus,** and the consequent conflicting holding with the 5th Circuit in **Seeber,** may well be attributable to confusion on the part of the Kentucky Attorney General with regard to the exact manner in which he was proceeding against the respondents. For example, although Kentucky alleges federal question jurisdiction with an amount in controversy exceeding $10,000 (App. 6) which would be unnecessary in an action brought pursuant to Section 304 [See Section 304 (a)], the lower court opinions reflect that Kentucky later took the position that their action was brought, at least in part, pursuant to Section 304. (App. 148; 162-3). The State of Alabama did not take such a position in its case.

Similarly, the Commonwealth of Kentucky sued the Administrator, apparently pursuant to Section 304, for failure to commence appropriate actions against the federal facilities with regard to the Kentucky permit requirements. (App. 137, 167). The State of Alabama, on the other hand, voluntarily dismissed its claim against the Administrator making clear its position that its action was brought pursuant to the enforcement provisions of its implementation plan only.

By inadvertantly basing its suit on Section 304, Kentucky apparently jeopardized its position on the merits by lending credence to respondents' erroneous argument that state actions against federal facilities are limited by that section to violations of emission standards and compliance schedules.

to mean that state facilities, as well as private facilities, are subject to *being sued* by a citizen, not that a state can sue as a citizen. This is the manner in which this term is used throughout the Act[34] as well as in the predecessor Air Quality Act of 1967, P.L. 90-148, from which the general definitional section of the Act was taken intact, and which did not even have a citizen suits' provision. Such an interpretation also explains the reference in Section 304(a)(1)(ii) to the Eleventh Amendment which, of course, concerns suits against a state filed by individual citizens of another state.[35]

To argue that a state is a person for purposes of suing a violator pursuant to Section 304(a)(1) is non-sensical in light of the express provisions of Section 304 and the Congressional purpose in enacting that section. Not only is Section 304 entitled "citizen suits," it also provides for court awarded attorneys' fees, hardly a provision one would find outside the realm of private litigation.[36] More importantly, Section 304 also provides that no action may be commenced against an alleged violator pursuant to that section unless the plaintiff has first given 60 days notice of the violation to both the Administrator and the state in which the violation occurs, *and* to the alleged violator. If either the state or

[34] See especially the manner in which the word "person" is used in Section 118, 42 U.S.C. 1857 f, and Section 113, 42 U.S.C. 1857 c-8.

[35] If a state is a "person" for purposes of bringing a Section 304 action, this would apparently apply equally to actions against non-federal, as well as federal, facilities. The State of Alabama has never brought an enforcement action against a non-federal facility, or a federal facility, in federal court pursuant to Section 304 under the assumption that it could not do so. Although Alabama believes that it has been correct in this assumption, it is certainly interested in this Court's interpretation of this section since a holding consistent with respondents' position would greatly increase Alabama's access to the federal courts in air pollution cases generally.

[36] Section 304(d), 42 U.S.C. 1857 h-2(d).

the Administrator commences an action against the violator within the 60 day period, or if the violator complies with the law within that time, the citizen is barred from filing his suit.[37] Section 304 cannot possibly include suits by state agencies as respondents suggest since there is no reason whatsoever for a state to be required to notify itself and the violator, and then wait 60 days before commencing an enforcement action.[38]

The Congressional purpose in adding Section 304 to the Act is readily apparent from the plain language of that section itself. The Act contemplates that the states, through their implementation plans, will generate and evaluate air quality and emissions data, develop emission standards and compliance schedules for each pollution source, and enforce violations or take whatever other action is necessary to insure compliance with the various implementation plan requirements. In the event that the responsible state or federal agency does not fulfill its enforcement obligations under the Act against a violator, Section 304 provides a means whereby an individual citizen may assume the enforcement role to insure that the provisions of the Act are expeditiously carried out. The role of the individual citizen, however, is primarily one of triggering the enforcement mechanism. It is only when the mechanism does not respond that the citizen is provided an opportunity to actually file suit, and then such

[37] Section 304(b), 42 U.S.C. 1857 h-2(b).

[38] To require a state to notify a violator and then wait 60 days before commencing an enforcement action would be especially disastrous with regard to air pollution emergencies when immediate action is an absolute necessity.

Interestingly, even if a state is considered a person for purposes of suing a violator, Section 304 (e), 42 U.S.C. 1857 h-2 (e), expressly allows a suit to be brought by a state pursuant to **state** law to enforce an "emmission standard or limitation or **to seek any other relief.**" (Emphasis added).

suits are limited to violations of emission standards and compliance schedules, violations which can typically be proven in a direct fashion either through simple discovery or on the basis of data already compiled and evaluated by the relevant state agency. This restricted access to the courts logically does not apply to *state* actions against a violator.[39]

II. THE LEGISLATIVE HISTORY OF THE ACT CONFIRMS THAT EXISTING FEDERAL FACILITIES MUST COMPLY WITH STATE PERMIT REQUIREMENTS.

Respondents' efforts to limit the scope of Section 118 despite the plain language of the Act to the contrary realistically rests exclusively upon their reading of the legislative history of Sections 118 and 304. The State of Alabama submits, however, that a thorough understanding of the legislative history of these and other sections of the Act shows that the Act was purposely redrafted to clarify that existing federal facilities must comply with all state pollution control requirements, and not just emission standards and compliance schedules as respondents suggest.

The original House version of Section 118 as reported out of the House Committee on Interstate and Foreign Commerce stated that all federal facilities

> ". . . shall comply with the applicable Federal, State,

[39] It is possible that a state may bring an action against the Administrator pursuant to Section 304 (a)(2), 42 U.S.C. 1857 h-2 (a)(2), since most of the reasons for restricting Section 304 actions to individual citizens apply only to suits against a violator. Although, as explained above, the State of Alabama voluntarily dismissed its action against the Administrator in the **Seeber** case, it does not take the position that such an action would necessarily be prohibited.

> interestate and local *emission standards* and with the purposes of this Act. . . ." H.R. Rep. No. 91-1146 91st Cong., 2d Sess. 34 (1970) (Emphasis added).

The Senate version as reported out of the Senate Committee on Public Works, however, used different terminology, providing that federal facilities

> ". . . shall comply with the *requirements of this Act* in the same manner as any person must so comply. . . ." (Emphasis added).

The Senate provision went on to add in subsection (b) that

> ". . . the Governor, the attorney general or any citizen of any State in which any Federal property, facility, or activity is located may seek to enforce the provision [sic] of this section pursuant to section 304 of this Act."
>
> S. Rep. 91-1196, 91st Cong., 2d Sess. 100 (1970).

The final version of Section 118, as drafted by the Conference Committee and enacted into law, uses terminology which differs from both the House and Senate version, providing that federal facilities

> ". . . shall comply with Federal, State, interstate, and local *requirements respecting control and abatement of air pollution* to the same *extent* that any person is subject to such requirements." 42 U.S.C. 1857f (Emphasis added).

In addition, the Conference Committee omitted all reference to enforcing the provisions of Section 118 through Section 304.

Respondents' principal argument is that although the

House version of Section 118 refers to "emission standards," whereas the Senate version uses the term "requirements", both the House and Senate committee reports state that federal facilities are required to meet "emission standards", thereby allegedly equating the House and Senate terminology. It is then argued that the Conference Committee "simply combined" the House and Senate provisions without expanding their limited scope.[40] Respondents further contend that the reference in the Senate version to actions by a Governor or attorney general to enforce Section 118 pursuant to Section 304 further indicates congressional intent to limit state actions against federal facilities, since Section 304 actions are so limited.[42]

It is certainly true, as respondents suggest, that the original House version of Section 118 would have required federal facilities to comply only with state emission standards, since this was the precise language used in that section. However, it is equally apparent that the House bill contemplated that state actions would be brought in proper court pursuant to state law and/or the enforcement provisions of state implementation plans, since that bill did not even have a citizen suit provision.[43]

The Senate version of Section 118 is more ambiguous, but the State of Alabama also tends to agree with respondents that in view of the Committee comment[44] and sub-

---

[40] Resp. Brief, pp. 27-30. Interestingly, neither the original language of the House bill, nor any of the committee reports, mentions that federal facilities must comply with compliance schedules as respondents admit they must.

[42] Resp. Brief, pp. 25-26.

[43] H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970).

[44] S. Rep. No. 91-1196, 91st Cong. 2d Sess. 23 (1970).

section (b) of the Senate version of Section 118, the "requirements of this Act" referred to are probably the requirements listed in the Senate citizen suits provision, Section 304 (a)(1) — namely, compliance schedules, emission requirements, standards of performance, emission standards, and prohibitions.[45]

But contrary to respondents' suggestion, the Senate version of Section 118 did not become law, nor was it "simply combined" with the House version of that section. Rather the Conference Committee *specifically redrafted* Section 118 to clarify that existing federal facilities must comply with *all* state pollution control requirements — not simply emission standards or requirements — and carefully integrated this change into other sections of the Act, the exact *same* sections which so clearly support the broad interpretation of the final version of Section 118 as discussed in the first section of this brief, above.[46]

The Conference Committee first redrafted Section 118 to require federal compliance with all "requirements respect-

---

[45] S. Rep. No. 91-1196, 91st Cong. 2d Sess. 122 (1970).

The State of Alabama does not agree, however, that subsection (b) of the Senate version of Section 118 was intended to limit state actions enforcing that section to actions pursuant to Section 304. Subsection (b) of the Senate proposal states that the Governor or attorney general **may** seek to enforce Section 118 pursuant to Section 304. Like the House, the Senate recognized that state actions could be brought in proper court against federal facilities pursuant to the enforcement authority of a state implementation plan.

[46] The Conference Committee report was ordered to be printed on December 17, 1970. [H.R. Rep. No. 91-1783, 91st Cong. 2d Sess. (1970)], exactly three months after the Senate Committee ordered its report to be printed. S. Rep. No. 91-1196, 91st Cong. 2d Sess. (1970). During this time the Conference Committee made several changes and innovations throughout the bill which do not correspond with the House and Senate proposals.

ing control and abatement of air pollution", a more comprehensive phrase.[47] The Committee then completely redrafted Section 116 of the Act, incorporating for the first time the phrase "requirement respecting control or abatement of air pollution" and expressly providing, contrary to respondents' argument, that such a requirement is not synonymous with an emission standard or limitation.[48] Similarly, the Conference Committee added Section 114 (b)(1), 42 U.S.C. 1857 c-9 (b)(1), relating to state procedures for implementing and enforcing informational requirements, and expressly stated that *new* federal pollution sources would be exempt from such state procedures, but that *existing* federal pollution sources would not.[49]

The Conference Committee also specifically omitted the Senate reference in Section 118 to the enforcement of that section through Section 304. Since the Conference Committee version of Section 304, like the earlier Senate version, expressly limited citizen suits against a violator to actions concerning emission standards and compliance schedules, this was necessary to insure that state actions against federal facilities would not be so limited. The phrase "including . . . the United States" in Section 304 (a)(1), 42 U.S.C. 1857

---

[47] The Conference Committee also required that federal facilities comply with these requirements "to the same **extent** that any person is subject to such requirements" changing the Senate language which required compliance "in the same **manner** as any person."

[48] See pages 18-20, above. Compare the language of Section 116, 42 U.S.C. 1857 d-1, to the House and Senate versions of this section. H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 32, 33 (1970) and S. Rep. 91-1196, 91st Cong., 2d Sess. 90, 91 (1970).

[49] Compare Section 114 (b)(1) to the Senate and House proposals which did not provide for such state procedures. S. Rep. 91-1196, 91st Cong., 2d Sess. 97, 98 (1970) and H.R. Rep. No. 91-1146, 91st Cong. 2d Sess. 28 (1970).

h-2 (a)(1), and the phrase "including a requirement applicable by reason of Section 118", Section 304 (f), 42 U.S.C. 1857 h-2 (f), however, were then added to clarify that a *citizen* could still sue a federal facility pursuant to Section 304, but only for violations of emission standards and compliance schedules as discussed above.

Pursuant to the Conference Committee changes, a state can, of course, continue to bring actions against federal facilities pursuant to independent state authority, or the enforcement authority of its implementation plan, to enforce *all* state requirements respecting control and abatement of air pollution, not just emission standards and compliance schedules. Contrary to respondents' suggestion in their brief, the parenthetical phrase in Section 304 (f) in no way suggests that emission standards and compliance schedules are the *only* requirements of Section 118.

The actual changes made by the Conference Committee speak louder than the Committee comment on Section 118 so heavily relied upon by respondents. That comment, in its entirety, is as follows:

> "The House bill and the Senate amendment declared that Federal departments and agencies should comply with applicable standards of air quality and emissions.
>
> "The conference substitute modifies the House provision to require that the President rather than the Administrator be responsible for assuring compliance by Federal agencies." H.R. Rep. 91-1783, 91st Cong. 2d Sess. 48 (1970).

Respondents' argument that this brief summary proves that the Conference Committee did not expand the scope of state control over federal facilities is completely without

merit. It is obvious from its face that this simple comment does not purport to be a comprehensive analysis of the changes made in that section, nor is it an accurate one. The first paragraph simply summarizes the original House and Senate proposals without addressing the Conference Committee changes. The second paragraph, which *does* attempt to address these changes, is ridiculously in error. Nowhere in the legislative history is there any indication whatever that either the President or the Administrator is in any sense "responsible for assuring compliance by federal agencies." To the contrary, the only reference to the President or the Administrator in either bill was specifically directed toward the power to *exempt* federal facilities from state control if in the paramount interest of the United States to do so.[50]

The State of Alabama is quite simply amazed at respondents' attempt to use this obvious mistake of the Conference Committee as a foundation for their newly-created argument that the President, rather than the states, has the primary duty to insure compliance with federal facilities (Resp. Brief, pp. 30-31), and for their subsequent contention that the December 19, 1973 Executive Order of the President should be entitled to weight in determining the proper interpretation to be given to Section 118 for purposes of this case. (Resp. Brief, pp. 32-33).[51]

---

[50] See H.R. 91-1146, 91st Cong. 2d Sess. 34 (1970) and S. Rep. 91-1196, 91st Cong. 2d Sess. 100 (1970). The only law which provided for any such responsibility was the Air Quality Act of 1967, P.L. 90-148, 81 Stat. 485, Section 111 (b) which delegated this power to the Secretary of the Department of Health, Education, and Welfare.

[51] See pages 43-46, below.

III. FEDERAL FACILITIES MUST COMPLY WITH STATE PERMIT REQUIREMENTS IF THE PURPOSES OF THE ACT ARE TO BE ACCOMPLISHED.

In redrafting Section 118 and other provisions of the Act to clarify that existing federal facilities are subject to all state requirements respecting the control and abatement of air pollution, the Conference Committee recognized the necessity of pre-attainment regulation of all existing facilities — federal, as well as non-federal — as an integral part of a state's efforts to fulfill the requirements of its implementation plan and achieve and maintain national air quality standards. As stated above, in Kentucky and many other states it is solely through the issuance of operating permits that the State pollution control agency actually carries out such regulation.

Pursuant to the EPA-approved Kentucky implementation plan, no person is allowed to construct or operate an air pollution source unless a permit therefor has first been obtained from the Kentucky Air Pollution Control Commission,[52] which permit is subject to terms and conditions which the Commission deems necessary to insure compliance with

---

[52] Kentucky Administrative Regulation AP-1, Section 5 (1). The Kentucky administrative regulations relevant to this case are printed in the appendix submitted to the Court of Appeals for the Sixth Circuit, pages 99-227.

its emission standards.[53] These conditional permits are then used by the Commission to enforce the essential provisions of the implementation plan relating to emission standards, compliance schedules, monitoring, record keeping and reporting, and emergency episodes.[54]

Although the comprehensive nature of the Kentucky permit system may not be as explicit as the permit systems of various other state implementation plans,[55] it is apparent from a review of Kentucky Administrative Regulation AP-1 in its

---

[53] See Kentucky Administrative Regulation AP-1, Section 5 (4), which states as follows:

> "Permits issued hereunder shall be subject to such terms and conditions set forth and embodied in the permit as the Commission shall deem necessary to insure compliance with its standards. Such terms and conditions may include maintenance and availability of records relating to operations which may cause or contribute to air pollution including periodic source of stack sampling of the air contaminate sources."

See also Kentucky Administrative Regulation AP-1, Section 5(2)(a) and (c).

[54] Kentucky Administrative Regulations, AP-1, Sections 7-9 and 11.

[55] Cf., for example, the permit system set forth in the Alabama implementation plan, **State of Alabama v. Seeber,** 502 F.2d 1238, 1240-1242 (5th Cir. 1974). Although identical in operation to the Kentucky plan, the Alabama plan more explicitly sets out that air pollution emergency plans, sampling and monitoring requirements, and progress reports are all an integral part of the permit system. [Alabama Air Pollution Control Commission Rules and Regulations, 1.12.8 (b)-(d); 1.12.9 (b)]

It was for this reason that the State of Alabama desired to consolidate its case with the present case. Since there was apparently some confusion in the 6th Circuit with regard to the operational effect of the Kentucky permit system, Alabama wanted to insure that this Court had before it on direct review a record which presented, as explicitly as possible, the true nature of the permit mechanism. See **Seeber v. Alabama,** No. 74-851, "Respondents' Motion to Reconsider and Grant Petition for Writ of Certiorari and Motion to Consolidate," pages 3-16.

entirety (Sections 1-12) that it is solely through the use of conditional permits that the Kentucky Air Pollution Control Commission is able to coordinate the various essential elements of the Kentucky plan and ensure that the purposes of the Act are accomplished.

If deprived of the use of these conditional permits, the success of a state's pollution control program depends exclusively upon the willingness of the polluter to voluntarily cooperate with the state pollution control agency during the three year pre-attainment period. In their brief and throughout the course of this litigation, respondents have implicitly argued for such a system of voluntary compliance by federal facilities.[56]

But voluntary cooperation is not what Congress had in mind when enacting the 1970 Amendments. The legislative history of the Amendments reflects that Congress was totally dissatisfied with the earlier, more lenient air pollution acts, and was particularly aware of the slothful habits of federal facilities in requesting appropriations for pollution control devices and putting such devices into actual use pursuant to those laws. The many reports and hearings on the Amendments indicate time and again that rather than exercising

---

[56] See, for example, Resp. Brief, pp. 8-10; App. 37-59.

Respondents do not contend, as did the Sixth Circuit, that Section 304 suits provide a means of **preventing** violations of emission standards as well as providing for after-the-fact enforcement of violations. **Kentucky v. Ruckelshaus,** above, at 1177. (App. 168). This contention is effectively answered in petitioner's brief, pp. 45-48, and other amici briefs.

leadership in controlling air pollution, federal facilities had been "notoriously laggard" in complying with the law.[57]

Nor has voluntary cooperation by federal facilities proven workable as a means of attaining emission and air quality standards. As one would have expected, the "willingness" to cooperate expressed years ago by the various federal facilities has been a poor substitute for the necessity of obtaining permits and fulfilling their conditions to which other facilities have been subjected, the result being that numerous federal facilities have only begun to take the requisite steps to achieve the compliance which non-federal facilities have already attained.

A case in point is respondent Tennessee Valley Authority. In spite of TVA's alleged willingness to cooperate with the

---

[57] See, for example, S. Rep. No. 91-1196, 91st Cong. 2d Sess. 23, 37 (1970); H. R. Rep. No. 91-1146, 91st Cong. 2d Sess. 4, 5 (1970); and S. Cong. Rec. Vol. 116, Part 24, p. 32911, September 21. 1970.

Acceptance by this Court of respondents' argument that federal facilities are not subject to state permit requirements pursuant to Section 118 would be a step backward from the more lenient requirements of the 1963 and 1967 Acts since even under these laws federal facilities were subject to operating permits.

The original Clean Air Act, as enacted by Congress in 1955, made no reference to federal facilities. The 1959 Amendments, however, required operators of federal facilities to "cooperate" with state and local air pollution control agencies "to the extent practicable and consistent with the interests of the United States and with available appropriations. . . ." (Section 118; P.L. 88-365; 73 Stat. 646). This provision was then strengthened by an amendment to the Act of 1963, retained in 1967, authorizing the Secretary of HEW to establish classes of pollution sources and to require the operators of federal facilities to obtain permits from him before operating such sources. Operators of federal facilities were also required to provide the Secretary with information deemed relevant to the issuance of these permits. [1963 Act, Section 7(b), P.L. 88-206, 77 Stat. 392; and 1967 Act, Section 111, P.L. 90-148, 81 Stat. 485.]

Alabama Air Pollution Control Commission, and the consistent representation by its spokesmen that the May 31, 1975, deadline would be met without the necessity of submitting itself to the requirements of the Alabama permit system, TVA's own recently submitted data show that only one of eight coal-fired boilers at its Widows Creek Steam Plant in North Alabama is presently in compliance with relevant particulate emission standards, with presently projected compliance dates reaching into 1978. As a result of TVA's poor performance in this regard, it has been necessary for Alabama to file suit against TVA requesting the Court to enjoin the operation of the Widows Creek facilities and/or assess a compensatory daily fine to continue as long as TVA operates these facilities in violation of the law.[58]

The failure of the voluntary approach urged by respondents is not simply limited to their own respective facilities. Despite repeated attempts to have all federal facilities submit data to state pollution control agencies, (App. 83-85), EPA found it necessary, only a few weeks before the mandatory attainment deadline in most states of May 31, 1975, to publish guidelines:

> ". . . to determine the compliance status of all Federal stationary sources of air pollutants . . . and establish firm public commitments to abate emissions as expediti-

---

[58] **State of Alabama v. Tennessee Valley Authority**, Civil Action No. 75-G2067NE, United States District Court for the Northern District of Alabama, filed November 3, 1975.

ously as practical from those facilities exceeding limitations."[59]

EPA's eleventh-hour attempt to exert authority over federal facilities in an effort to hasten compliance is simply too little too late. The State of Alabama submits that these same federal facilities would be in compliance, and the EPA guidelines would not be necessary, if only the states had been allowed to subject these federal facilities to the requirements of their respective permit systems three years ago.

Interwoven throughout respondents' brief, the 6th Circuit opinion, and the letters and memos written on this subject by respondent EPA, is the notion that there is something *per se* objectionable about an arm of the federal government being required to obtain an operating permit from a state agency — even when the Act specifically states that it must. Implicit in this notion, perhaps, is the fear of some form of arbitrary reprisal which may be levied against the federal facility by an irrational state agency. But as a practical matter, the best way for a federal facility to protect itself against the threat of a major legal attack by a state or citizen with possible severe consequences is by obtaining a permit and working with the state air pollution control agency pursuant to the conditions of that permit to ensure that compliance will be attained as soon as possible. These

---

[59] 40 Fed. Reg. 20664. Ironically, respondents have attempted to use these guidelines to suport their argument that EPA has consistently interpreted Section 118 to mean that federal facilities are not subject to state permit requirements.

Read in conjunction with the earlier January 26, 1973, memorandum on this same subject (App. 83-85), these guidelines paint a picture of the futility of one federal agency attempting to have another federal agency comply with the law through friendly persuasion.

permits allow for a rational exchange of ideas and information, including public particiaption through required public hearings, as an alternative to litigation which, as this case has demonstrated, is to no one's advantage.

IV. THE ENVIRONMENTAL PROTECTION AGENCY'S INTERPRETATION OF SECTION 118 IS NOT ENTITLED TO SPECIAL CONSIDERATION.

Respondents contend that simply because the Environmental Protection Agency has stated its view that Section 118 does not require federal facilities to comply with state permit requirements, this view is entitled to special consideration. (Resp. Brief, pp. 31-34). As supporting authority for their position, respondents primarily rely upon the recent opinion of this Court in *Train v. Natural Resources Defense Council*, above.

In *Train*, the Natural Resources Defense Council filed a petition in the Court of Appeals pursuant to Section 307 (b)(1) of the Act, 42 U.S.C. 1857 h-5(b)(1), to review an EPA order approving certain provisions of Georgia's implementation plan relating to the allowance of individual source variances from the Act's mandatory 3-year compliance deadline. In its petition, the NRDC claimed that EPA had erroneously interpreted Section 110(a)(3) and 110(f) of the Act, 42 U.S.C. 1857 c-5(a)(3) and (f), which interpretation had first been incorporated in the *original EPA guidelines* promulgated for use by all the states in formulating their respective implementation plans.[60] The Fifth Circuit found

---

[60] **Natural Resources Defense Council v. Environmental Protection Agency,** 489 F.2d 390, 393 fn. 1 (5th Cir. 1974), and **Train v. Natural Resources Defense Council,,** 43 L.Ed. 2d, at 741.

for petitioners, but this Court reversed. Citing *Udall v. Tallman*, 380 U.S. 1, 16-18, 13 L.Ed.2d 616, 85 S.Ct. 792 (1965), and *McLaren v. Fleischer*, 256 U.S. 477, 480-481, 65 L.Ed. 1052, 41 S.Ct. 577 (1921), the Court, speaking through Justice Rehnquist, noted that there had "undoubtedly been reliance upon its [EPA's] interpretation by the States and other parties affected by the Act" and, after a careful review of the language of the Act and its legislative history, concluded that the EPA construction of the Act had been "sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency."[61]

The State of Alabama submits that in no event can EPA's view of Section 118 be considered "reasonable" in view of the plain language and legislative history of the Act to the contrary, and the total failure of voluntary cooperation by federal facilities as an alternative means of accomplishing the general goals and objectives of the Act. Furthermore, and equally as important, the comments of the Court in *Train*, *Udall*, and *McLaren* clearly indicate that courts generally will defer to an administrative agency only where there has been a significant degree of detrimental reliance upon the agency's interpretation of the statute in question. Such is certainly not the case on the facts before us.

Here there were no regulations promulgated by EPA concerning an interpretation of Section 118, much less as a part of their original implementation plan guidelines as in *Train v. N.R.D.C.* To the contrary, EPA expressly approved the implementation plan submitted by the Commonwealth of Kentucky which provided for an extensive permit

---

[61] **Train v. Natural Resources Defense Council**, 43 L.Ed. 2d, at 750; see also p. 743.

system as the principal mechanism for achieving national air quality standards in that state.[62]

The only three examples in the record of an EPA interpretation of Section 118 are an October 17, 1972, letter from the Regional Administrator of EPA to respondent Tennessee Valley Authority (App. pp. 55-59 and 79-82), a January 26, 1973, memorandum from EPA to all federal agencies, and the May 6, 1975, guidelines discussed in the previous section. But even the earlier October 17, 1972, letter was issued *after* approval of the Kentucky plan by EPA and after the Kentucky Air Pollution Control Commission had made several requests that respondents comply with applicable permit requirements (App. 35-54), and even then simply referred to the suggested guidelines in the letter as "our advice on this matter, at this time." (App. 57).[63] The January 26, 1973, memorandum expressing EPA's view on this subject was, of course, even later, and specifically referred to the fact that several court cases were already underway to determine the legality of state permits for federal facilities, and that the courts, would "resolve this issue." (App. 84-85). As for the May 6, 1975, guidelines issued by EPA, as discussed above, these were no more than an after the fact admission of the unworkability of respondents' scheme.

---

[62] As noted above, fn. 15, not only was the Kentucky implementation plan approved by EPA generally, Kentucky's permit system was apparently the type procedure "encouraged" by EPA, whereas state plans providing for attainment of the national standards in three years without enforceable pre-attainment procedures to insure compliance were looked upon with disfavor. **Train v. N.R.D.C.**, 43 L.Ed. 2d, at page 740.

[63] The State of Alabama's action against the Tennessee Valley Authority involving the identical disputed issues was filed on October 20, 1972, almost one month earlier than the Kentucky action, and only three days after the October 17 letter.

The fact of the matter is that there was a dispute between Kentucky and the federal facility respondents from the first moment that the federal facilities refused to comply with the requirements of the Kentucky permit system, and only substantially later did EPA come in on the side of its fellow federal agencies. To now contend that EPA's position on this issue should be accorded extra weight in resolving this dispute is a bootstraps argument of the greatest magnitude.

Nor can the federal facility respondents claim to be injured in any respect if they are now required by this Court to obtain a Kentucky permit. To the contrary, it is the states and their respective citizens who are presently suffering the consequences of respondents' decision to contest Kentucky's authority to regulate them prior to the emission deadline.

Respondents' final comments with regard to Executive Order 11752, the Administrative Conference, and pending federal legislation (Resp. Brief, pp. 32-34) are totally irrelevant to the issues before this Court, and only serve to emphasize the desperate nature of their argument.

V. THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 CONFIRM THAT EXISTING FEDERAL FACILITIES MUST COMPLY WITH STATE PERMIT REQUIREMENTS UNDER THE AIR ACT.

The State of Alabama submits that its interpretation of Section 118 gains additional support from the plain language of the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. (Supp. III) 1251, *et seq.* (the "Water Act"), which established a nationwide scheme of water pollution control analagous to the federal-state scheme established by the Clean

Air Amendments of 1970.

Like the predecessor Air Act, the Water Act places the primary responsibility for pollution control in the states, providing for state water pollution control programs, promulgated pursuant to specific guidelines and subject to approval by the Environmental Protection Agency, as the primary mechanism for fulfilling this responsibility. Similarly, the Water Act recognizes that state authority over *all* pollution sources is necessary for the state programs to succeed, and specifically provides, therefore, that all federal facilities "shall comply with Federal, state, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements . . ." Section 313, 33 U.S.C. (Supp. III) 1323, language derived from, and virtually identical to, Section 118 of the Air Act.

Because of this virtually identical language in Section 118 of the Air Act and Section 313 of the Water Act with regard to state control over federal facilities, and because of the strong similarity of the two Acts generally, it is possible that an analysis of other provisions of the Water Act may assist this Court in its resolution of that language as applied to the Air Act — and this is indeed the case. When read in conjunction with one another, it is apparent that both the Water Act and the Air Act require that federal facilities comply with *all* state requirements respecting the control and abatement of air pollution, including state permit requirements.

The Water Act shares with the Air Act many of the important provisions relied upon by Alabama in its brief, below,[64] but, more importantly, each respective Act contains

[64] Cf., especially, Section 116 of the Air Act, 42 U.S.C. 1857 d-1, and Section 510 of the Water Act, 33 U.S.C. (Supp. III) 1370.

unique provisions which serve to rebut the arguments forwarded by the federal facilities with regard to the *other* Act. For example, the petitioners' position in the consolidated case of *EPA v. California,* No. 74-1435, is substantially weakened by the fact that the Air Act specifically provides in Section 114 (b) (1) that states *may* implement and enforce informational requirements with regard to existing federal facilities.[65] Similarly, the specious nature of petitioners' argument in *EPA v. California* with regard to the weight to be given EPA's interpretation of Section 313 of the Water Act is less plausible when viewed in context of the facts of the present case which provide no support whatsoever for their position.

More important to the issues before this Court in the present case, however, is the fact that the citizen suits provision of the Water Act, expressly equates a Section 313 "requirement" with a state permit. Section 505 (f), 33 U.S.C. (Supp. III) 1365 (f).[66] This clarifying language in itself is enough to confirm the fact that Congress intended that federal facilities be required to comply with state permit requirements when it passed the Clean Air Act.

The State of Alabama submits that there is no reason whatever to presume that Congress would have used the same language in Section 313 of the Water Act as it had used in Section 118 of the Air Act without intending those provisions to be applied in the same manner, and the provisions of both Acts mutually support the fact that this

---

[65] See petitioner's brief in **EPA v. California,** pp. 27-28. See also Section 111 (d) of the Air Act, discussed below on page 22.

[66] See p. 19 of California's brief in **EPA v. California** for a more complete discussion of this provision.

language was intended to subject federal facilities to state permit requirements with regard to both water and air pollution control.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, below, should be reversed, and respondents directed to apply to the Kentucky Air Pollution Control Commission for a conditional operating permit.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of the
State of Alabama

HENRY H. CADDELL
Assistant Attorney General
Chief, Environmental Protection
Division

FREDERICK S. MIDDLETON III
Assistant Attorney General